

12. Discontinuance, Reduction or Impairment of Service

186. The Commission implemented its license forfeiture rules to ensure station operation and alleviate concerns about spectrum warehousing.⁴⁴⁷ When considering forfeitures, cancellation and discontinuance of service, an MDS licensee has five separate rule sections to review an ITFS licensee has three separate rule sections to review.⁴⁴⁸ Because a system can have both **ITFS** and MDS channels, we believe that consolidating these rules will be advantageous to both the industry and the Commission staff. We tentatively conclude that consolidating these rules will reduce the confusion of the industry as to the appropriate rules and increase the efficiency of the Commission staff in processing these actions. We propose to move, revise, and consolidate these rules in Parts 1 and 101 of our rules.

187. We note that MDS licensees may alternate between providing service as a common carrier or a non-common carrier.⁴⁴⁹ However, before alternating, the licensee must notify the Commission of the change at least thirty days before the **change**.⁴⁵⁰ Additionally, common carriers who seek to alternate or who otherwise intend to reduce or impair service must notify all affected customers of the planned discontinuance, reduction, or impairment on or before providing notice to the **Commission**.⁴⁵¹ These provisions concerning licensees alternating between common carrier and non-common carrier status are not in **our** Part 101 rules. We invite comment on whether we should retain these rules and consolidate them in Part 101.

188. Through these actions, we are proposing above, we are endeavoring to ensure station operation and to alleviate concerns about the warehousing of spectrum in MDS/ITFS. The MDS/ITFS community, however, has asked **us** to liberalize the rules **on** forfeiture of license and discontinuance of service due to the transition of the spectrum to new uses. For instance, the industry has called for a liberalizing of the rules regarding the retention and periodic use of facilities to provide for simpler preservation of downstream authorization for stations operating upstream and to provide for preservation of licenses **for** channels being used **as** guard **bands**.⁴⁵² Therefore, we invite comment **on** the proposals described in this section. We invite alternate proposals that would allow for flexible use of the spectrum while preserving **our** policy of ensuring station operation and alleviating concerns about the warehousing of spectrum.

⁴⁴⁷ See Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, WT Docket No. 94-148, *Report and Order*, 11 FCC Rcd 13,449, 13,465 (1996).

⁴⁴⁸ See 47 C.F.R. §§ 21.44; 21.303; 21.910; 21.932; 21.936; 73.3534 73.3598; 74.932

⁴⁴⁹ See 47 C.F.R. §§ 21.903(d); 21.910.

⁴⁵⁰ See 47 C.F.R. § 21.903(d) which provides that the notification must state whether there is any affiliation or relationship to any intended or likely subscriber or program originator.

⁴⁵¹ See 47 C.F.R. § 21.910 which provides that the notice shall **be** in writing and shall include the name and address **of** the carrier, the date of the event, the area(s) affected and the channels that are affected **by** the event. *Id.* at § 21.910(b).

⁴⁵² Coalition Proposal at 44-45.

13. Foreign Ownership Restrictions

189. Sections 310(a) and 310(b) of the Communications Act, as modified by the Telecommunications Act of 1996, impose foreign ownership and citizenship requirements that restrict the issuance of licenses to certain applicants.⁴⁵³ An applicant requesting authorization only for non-common carrier services would be subject to Section 310(a), but not to the additional prohibitions of section 310(b). An applicant requesting authorization for *common* carrier services would be subject to both Sections 310(a) and 310(b). We do not believe that common carriers and non-common carriers filing an application to operate in this band should be subject to varied reporting obligations. Rather, as a matter of fostering regulatory parity and transparency, we believe that **all** applicants should be required to file changes in foreign ownership information to the extent required by Part 101 of our **Rules**.⁴⁵⁴ By establishing parity in reporting obligations, however, we do not propose a single, substantive standard for compliance. For example, we do not and would not deny a license to an applicant requesting authorization exclusively to provide services not enumerated in Section 310(b), solely because its foreign ownership would disqualify it from receiving a license if the applicant had applied for a license to provide the services enumerated in Section 310(b). We request comment on this proposal.

14. Performance Requirements

190. Incumbents in the 2500-2690 MHz band consist of **MDS** BTA Authorization holders and site-based ITFS and MDS licensees. In addition, as noted above, we are seeking comment on, among other things, whether geographic licensing for unassigned ITFS spectrum would be appropriate. In this section, we discuss the various performance requirements applicable to the categories noted above and seek comment on whether we should retain those requirements or whether we should make changes. We also seek comment on the construction benchmarks we should adopt to encourage licensees to deliver service to rural areas. We note that the Communications Act requires **us** to adopt policies to deter spectrum warehousing, promote the rapid development and deployment of new technologies and services, and promote service to rural areas.⁴⁵⁵

⁴⁵³ 47 U.S.C. § 310(a), (b)

⁴⁵⁴ 47 C.F.R. §§ 101.7, 1.913, 1.919. Moreover, as we observed in the *LMDS 2d R&O*, requiring submission of ownership information that may not be immediately necessary to assess the qualifications of a licensee (i.e., one who currently operates as a non-common carrier) is an efficient and reasonable measure to facilitate the flexibility accorded licensees to change status with a minimum of regulatory interference. With this approach, updated information can be used whenever the licensee changes to common carrier status without imposing an additional filing requirement when the licensee makes the change. Moreover, having access to this ownership information allows the Commission to monitor all of the licensed providers more effectively, in light of their ability to provide both common and non-common carrier services. Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and For Fixed Satellite Services, **Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking**, CC Docket No. 92-297, 12 FCCRd 12545 (1997) (*LMDS 2d R&O*).

⁴⁵⁵ "[T]he Commission is required under Section 309 (j) of the Communications Act to include 'safeguards to protect the public interest in use of the spectrum' and performance requirements 'to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services.'" **WCSP Report and Order**, 12 FCCRd. at 10841 (quoting 47 U.S.C. § 309(j)(4)(B)) (footnote omitted).

191. **MDS BTA Authorization Holders.** Currently, MDS BTA authorization holders have a five-year build-out period, which begins on the date of the grant of the MDS BTA authorization and ends on the fifth anniversary of the authorization **grant**.⁴⁵⁶ This build-out period is not extended by the grant of subsequent authorizations.” Timely certifications of completion of construction for each MDS station within a MDS BTA or partitioned service area must be filed on completion of the construction of a station.⁴⁵⁸ Within five years of a grant of a MDS BTA-authorization, the authorization holder must construct MDS stations to provide signals pursuant to Section 21.907 of the Commission’s Rules⁴⁵⁹ that are capable of reaching at least two-thirds of the population of the applicable service area, excluding the populations within protected service areas of incumbent MDS stations⁴⁶⁰ and the authorization holder must file sixty days prior to the end of the five-year build-out period that it has met this requirement.⁴⁶¹ If the Commission finds that the authorization holder has met this requirement, the Commission will issue a declaration *so* stating.” If the Commission finds that the BTA authorization holder did not meet this requirement, the **Commission** will partition from the BTA any unserved area and will reauthorize service to the unserved area pursuant to the MDS competitive bidding procedures⁴⁶³ and the BTA authorization holder originally authorized to provide service will be ineligible to participate in the auction of the unserved areas.⁴⁶⁴ We seek comment on whether we should retain these requirements as they are, or whether they should be changed or clarified in some way. If they should be changed, commenters should recommend specifically those requirements that should be changed, those that should be clarified, and those that should remain unchanged. In the alternative, we seek comment on whether we should adopt a different approach altogether, such as a substantial service approach. We note that for services that require ubiquitous coverage, the Commission has required that at the time **of** license renewal each geographic area authorization holder demonstrate that it has made “substantial service” available within its authorized service area.⁴⁶⁵ The Commission has observed that the substantial service standard affords

⁴⁵⁶ See 47 C.F.R. § 21.930(a)(1).

⁴⁵⁷ See 47 C.F.R. § 21.930(a)(2).

⁴⁵⁸ See 47 C.F.R. § 21.930(a)(3).

⁴⁵⁹ 47 C.F.R. § 21.907.

⁴⁶⁰ See 47 C.F.R. § 21.930(c)(1).

⁴⁶¹ See 47 C.F.R. § 21.930(c)(2).

⁴⁶² See 47 C.F.R. § 21.930(d)(1).

⁴⁶³ See 47 C.F.R. § 21.930(d)(2).

⁴⁶⁴ See 47 C.F.R. § 21.930(d)(2)(ii).

⁴⁶⁵ Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (“WCS”), GN Docket No. 96-228, **Report and Order**, 12 FCC Rcd 10785, 10843-45 (1997) (**WCS Repon and Order**); **LMDS 2d R&O**, 12 FCC Rcd at 12,659-61, *aff’d Melcher v. FCC*, 134 F.3d 1143, 1161-2 (D.C. Cir. 1998); Amendments to Parts 1, 2, 87, and 101 of the Commission’s Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, **Report and Order**, 15 FCC Rcd 16934, 16950-52 (2000) (**24GHz Report and Order**); **39 GHz R&O**, 12 FCC Rcd at 18624-25; Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range, ET Docket No. 98-206, **Memorandum Opinion and Order and Second Report and Order**, 17 FCC Rcd 9614, 9684-9685, ¶ 177 (2002) (**MVDDS Memorandum Opinion and Order and Second Report and Order**).

maximum flexibility for authorization holders to offer a range of services and fosters competition.⁴⁶⁶ If we were to adopt a substantial service approach, should we also adopt safe harbors? We ask commenters who believe that we should adopt safe harbors to recommend specific safe harbors. Accordingly, if the Commission adopts a substantial service performance standard, we propose that any licensee who fails to meet the standard with respect to a license will forfeit the license or be ineligible to renew the license pursuant to sections 1.946(c) and 1.955(a)(2) of our rules.⁴⁶⁷ Additionally, we propose to eliminate extension of time requests for MDS BTA Authorization holders who must satisfy a substantial service performance standard. We seek comment on this proposal.

192. **Site-based licensees.** As noted above, we are proposing to provide each incumbent on a current ITFS channel and each MDS incumbent with a PSA based on a circle with a 35-mile radius around its main station. Currently, the rules provide MDS incumbent stations with a maximum construction period of twelve months from the date of the license grant.⁴⁶⁸ We note that the Commission extended the construction period from eight months to twelve months to provide MDS permittees with sufficient time to meet the construction requirements without requesting extensions of time.⁴⁶⁹ ITFS licensees have eighteen months from the date of the issuance of the original construction permit to construct their facilities.⁴⁷⁰ We seek comment on whether we should retain these requirements or

⁴⁶⁶ “Based on the record in this proceeding, we believe that the substantial service standard, in lieu of specific coverage requirements best serves the public interest. In addition to being consistent with the approach used in other wireless services, we believe that this standard is sufficiently flexible to foster expeditious development and deployment of systems and will ultimately create competition among service providers in this band.” 24 *GHz Report and Order*, 15 FCC Rcd at 16951. “This approach [substantial service] will permit flexibility in system design and market development, while ensuring that service is being provided to the public.” 39 *GHz Report and Order*, 12 FCC Rcd 18624.

⁴⁶⁷ 47 C.F.R. §§ 1.946(c) and 1.955(a)(2). See also 47 C.F.R. § 101.1325.

⁴⁶⁸ See 47 C.F.R. § 21.43(a).

⁴⁶⁹ Revision of Part 21 of the Commission’s Rules, *Notice of Proposed Rulemaking*, CC Docket No. 86-128, 104 F.C.C.2d 116, 125 n.41 (1986). We permit extensions of time to construct when the authorization holder applies for the extension and submits: 1) a verified statement of diligent efforts to construct, and 2a) the delay is due to circumstances beyond the applicant’s control, or 2b) there are unique and overriding public interest concerns. See 47 C.F.R. §§ 21.11(b), 21.40(b). A carrier who does not promptly construct facilities precludes others who are willing and able to construct from access to the spectrum.” See Revision of Part 21 of the Commission’s Rules, *Report and Order*, 2 FCC Rcd 5713, 5721 (1987) (1987 *Report and Order*). “In order to ensure timely construction of facilities, the Commission announced its intent to enforce strictly construction deadlines . . . when it established a construction period of 12 months.” See also *Miami MDS Co.*, 7 FCC Rcd 4347, 4349 (1992), *affd mem*, *Miami MDS Co., v. FCC*, 14 F.3d 658 (D.C. Cir. 1994). Consequently, we do not grant extensions of time for delays caused by the lack of financing or the lack of site availability. See 47 C.F.R. § 21.40(b).

⁴⁷⁰ See 47 C.F.R. § 73.3534(a). The Commission recognized that a one-year period may not be sufficient for ITFS licensees due to the budgeting and scheduling processes for educational institutions could delay the construction of ITFS facilities beyond the one year period.” Amendment of Part 74 of the Commission’s Rules and Regulations in Regard to the Instructional Television Fixed Service, *Report and Order*, MM Docket No. 83-523, 98 F.C.C.2d 925, 935 (1984). However, the Commission provided that ITFS licensees could obtain an extension of time to construct by submitting a specific, detailed narrative statement demonstrating that the delay is due to “causes not under the control of the permittee, or upon a specific and detailed showing of other sufficient justification for extension. See 47 C.F.R. § 73.3534(c). An ITFS extension of time applicant must demonstrate that 1) construction is complete and testing of facilities has begun; 2) substantial progress has been made; or 3) reasons clearly beyond the applicant’s control, which the applicant has taken all possible steps to resolve, have prevented (continued....)

whether they should be changed. **Do** licensees need more time to construct? If licensees need more time to construct, how much is appropriate? Should **MDS** and **ITFS** site-based licensees be given the same time to construct? Or are there reasons to treat **MDS** and **ITFS** site-based licensees differently?

193. **Geographic area licensing.** As noted above, we seek comment on whether we should license unassigned ITFS spectrum via a geographic area overlay license. If we were to adopt such an approach, we seek comment on whether we should adopt the same performance standard for geographic licensees of unassigned ITFS spectrum as we do for **MDS** BTA Authorization holders. Are there any reasons that they should be treated differently? In other words, if we decide to retain the current performance requirements for **MDS** BTA authorization holders, discussed above, should we apply those same requirements to geographic licensees of unassigned ITFS spectrum? Or, if we were to adopt a substantial service standard for **MDS** BTA Authorization holders, should we adopt that same standard for geographic licensees of unassigned ITFS spectrum? If not, commenters should specify a different approach for geographic area licensee of unassigned ITFS spectrum. Commenters should also state the reason that licensees of unassigned ITFS spectrum should be treated differently than **MDS** BTA Authorization holders. We note that commenters to the recent *Extension Memorandum Opinion and Order* proceeding consistently advocated the replacement of the current build-out requirement with a substantial service benchmark.⁴⁷¹ Accordingly, if the Commission adopts a substantial service performance standard, we propose that any licensee who fails to meet the standard with respect to a license will forfeit the license or be ineligible to renew the license pursuant to sections 1.946(c) and 1.955(a)(2) of our rules.⁴⁷² Additionally, we propose to eliminate extension of time requests for geographic area licensees who must satisfy a substantial service performance standard. We seek comment on this proposal.

194. **Coalition Proposal.** Although the Coalition did not recommend an overlay approach for licensing unassigned ITFS spectrum, the Coalition did recommend that a transition to a pure geographic licensing system for the Services presents the need and opportunity to adopt revised performance requirements for licensees.⁴⁷³ Instead of continuing to use site-based licensing procedures, the Coalition advocates using a substantial service requirement at the time of renewal, coupled with safe harbors designed to provide licensees with a measure of certainty and an appropriate period for service activation

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construction. *See ITFS Report and Order*, 10 FCC Rcd at 2921. Thus, depending on the circumstances, the lack of funding may warrant an extension of time to construct for an ITFS licensee. *See* Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service Gen. Docket No. 90-54, Gen. Docket No. 80-1 13, Amendment of Parts 21 and 73 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Third Order on Reconsideration and Order to Clarify*, 11 FCC Rcd 17003, 17011 (1996).

⁴⁷¹ *See e.g.* WCA Comments at 7-11 (filed May 9, 2001); Sprint Comments at 2-3 (filed May 9, 2001); WorldCom, Inc. Comments at 4-6 (filed May 9, 2001); Nucentrix Broadband Networks, Inc. Comments at 9-10 (filed May 9, 2001); Hubbard Trust Comments at 5 (filed May 9, 2001); Wireless One of North Carolina, L.L.C. Reply Comments at 1-3 (filed May 16, 2001).

⁴⁷² 47 C.F.R. §§ 1.946(c) and 1.955(a)(2). *See also* 47 C.F.R. § 101.1325

⁴⁷³ Coalition Proposal at 43.

following adoption of the new rules, for those licensees with early forthcoming license expirations.⁴⁷⁴

195. The Coalition argues that using a case-by-case standard to evaluate MDS and ITFS construction is appropriate. Unlike most other services, they assert that MDS/ITFS system operators will provide service using channels combined from a variety of sources – their own BTA authorized stations, incumbent MDS stations they own, and leased capacity of MDS and ITFS stations licensed to others.⁴⁷⁵ Thus, focusing solely on the population served via stations authorized pursuant to a particular license hardly tells the story as to whether the licensee is providing adequate service to the public.⁴⁷⁶ In fact, they say, the Commission should recognize that in some cases a licensee may not use particular spectrum covered by one license, or certain channels authorized by a license, that is part of a larger operating system at the time of renewal. Instead, the licensee may use the spectrum in the system as a guard band – not used in the classic sense, but they argue a critical component of the system design.⁴⁷⁷

196. Alternatively, they say, the licensed spectrum may not be built-out, but instead the system operator may hold the spectrum for future use as the demands of the operating system expand.⁴⁷⁸ Still licensees may construct other systems for use by particular constituents rather than the general population covered by a GSA.⁴⁷⁹ The Coalition maintains that it is also essential that system operators just launching systems hold spectrum in reserve to address increases in demand and that there is no valid reason to penalize MDS and ITFS licensees for providing that spectrum. Particularly with respect to licenses that come up for renewal in the early years of MDS/ITFS broadband deployment, they assert that a channel-by-channel evaluation will not provide an accurate assessment of service development.⁴⁸⁰ For those reasons, they conclude, the flexibility inherent in the case-by-case application of the substantial service standard provides the Commission with a means of examining the entire picture.⁴⁸¹

197. The Coalition recommends that we clarify that a substantial service evaluation will include not only the service areas of incumbent stations that are directly owned by the entity, which holds the BTA authorization, but also the service areas of incumbent stations owned by any entity controlled by the same ultimate parent company as is the BTA authorization holder.⁴⁸² We seek comment on the Coalitions recommendations.

198. Rural areas. We seek comment on whether and how we may use construction benchmarks to encourage licensees to deliver wireless services to rural populations. To what extent are our current construction benchmarks effective in ensuring that spectrum-based services are provided to

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.* at 45.

⁴⁷⁶ *Id.* at 47-48.

⁴⁷⁷ *Id.* at 45.

⁴⁷⁸ *Id.* at 46.

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.* at 45-46.

⁴⁸² Coalition Proposal at 49.

rural areas? In what instances, and under what circumstances, should the Commission adopt a population-based, geography-based, or substantial service construction benchmark? For example, in licensing service areas that are predominantly rural, should the Commission adopt geography-based construction benchmarks? Are there other types of construction benchmarks that would promote service to rural regions better? For instance, should we adopt a separate construction benchmark applicable only to service areas that constitute rural areas? Alternatively, should we revise our current construction benchmarks to permit service providers to serve either smaller portions of the population or service area if they meet a second construction benchmark applicable to the rural portions of a licensee's market? If so, commenters should explain what construction benchmarks we should adopt for the rural portions of the service area and how to determine whether an area is rural? If, as suggested above, we were to require licensees to disaggregate **or** partition unused spectrum or unserved portions of geographic service areas, should we adopt additional construction benchmarks to implement this requirement? If so, what penalties should the Commission impose on licensees for failure to timely meet such additional construction benchmarks? The Commission has generally accepted certifications of CMRS carriers that they have met their construction benchmarks.⁴⁸³ To what extent are our self-certification procedures an adequate means of ensuring compliance with our construction benchmark requirements?

199. Extension/Suspension of current performance requirements for MDS BTA Authorization holders. The Coalition requests that we immediately suspend the MDS BTA build-out deadline in Section **21.930**, as extended by the *MDS Build-Out Extension Order*, while our build-out policy for this service remains subject to pending rulemaking proceedings.⁴⁸⁴ We note that on August **16, 1996**, the Commission granted **334 of the 493 BTA authorizations**.⁴⁸⁵ As a result, the five-year build-out period for these authorizations ended on August **16, 2001**. However, before the end of the build-out period, the former Mass Media Bureau extended the construction deadline for BTA authorizations to August **16, 2003** or the existing build-out date, whichever is later.⁴⁸⁶ The former Mass Media Bureau found that a maximum of two years would be a sufficient amount of time to allow the MDS industry to build-out its facilities and provide new and innovative two-way services to the public.⁴⁸⁷ The former Mass Media Bureau found that a longer extension period would unreasonably delay MDS entry in both rural and urban markets.⁴⁸⁸ At that time, the former Mass Media Bureau indicated that the Commission would address issues concerning the clarification, modification, or abolishment of the MDS BTA requirement in an upcoming rulemaking.⁴⁸⁹

⁴⁸³ See Facilitating The Provision Of Spectrum-Based Services To Rural Areas And Promoting Opportunities For Rural Telephone Companies To Provide Spectrum-Based Services, WT Docket No. 02-381, *Notice of Inquiry*, 17 FCC Rcd 25,554 at ¶ 22 (2002).

⁴⁸⁴ *Id.* at 50; see also paras. 168- 169.

⁴⁸⁵ See Extension of the Five-Year Build-out Period for BTA Authorization Holders in the Multipoint Distribution Service, *Memorandum Opinion and Order*, 16 FCC Rcd 12593, 12594-12595 ¶ 5 (2001). The Commission did not alter the construction deadlines that already fell after August 16, 2003.

⁴⁸⁶ *Id.* at 12593 ¶ 1

⁴⁸⁷ *Id.* at 12,596 ¶ 8.

⁴⁸⁸ *Id.* at 12,596 ¶ 8

⁴⁸⁹ *Id.* at 12,597 ¶ 9

200. In light of the breadth of the proposals set forth in this *NPRM & MO&O*, and our re-evaluation of performance standards for the 2500 -2690 MHz band, we believe that suspending the current August 16, 2003 construction deadline for BTA authorization holders is in the public interest. While we are normally reluctant to suspend a build-out requirement, a suspension of this construction deadline will allow the Commission to evaluate the performance requirements and service rules for this band. This approach is consistent with prior Commission actions suspending a deadline while relevant policy is subject to the pending rulemaking proceedings.⁴⁹⁰ Accordingly, we will suspend the BTA construction deadline pending the release of a *Report and Order* in this proceeding. We seek comment, however, on how much additional time we should give MDS BTA Authorization holders. Should we toll the time from the release of the *NPRM* until the August 16, 2003 deadline, which is approximately five months and give them an additional five months from the release date of the *Report and Order* in this proceeding? Should we give them eight months from the release of the *Report and Order* in this proceeding? Should we give them an additional two years from the release date of the *Report and Order* in this proceeding?

201. *Extension/Suspension of current performance requirements for site-based licensees.* Moreover, we also believe that it is in the public interest to suspend the construction deadline for ITFS and MDS site-based licensees and permittees that have unexpired licenses or permits that have not expired as of the release date of the *NPRM & MO&O* and that have made a timely filed extension request. We seek comment, however, on whether we should review those timely filed extension requests to construct under our current rules and suspend the construction deadline only for those that comply with the current rules, or whether we should automatically suspend the construction deadline for all timely filed requests for extension of time to construct. If we should automatically grant such requests, how much time should licensees or permittees receive to construct? We seek comment on whether this suspension should also cover licensees and permittees whose requests for extension of time have been denied, but who have timely petitions for reconsideration or applications for review pending. We also request comment on the proper treatment of objections or other pleadings that have been filed against requests for extension of time. We emphasize that the suspension of this construction deadline for site-based licensees does not affect the requirement for such licensees to timely file a renewal application.⁴⁹¹ We stress that all site-based licensees are required to timely file renewal applications or face cancellation of their licenses regardless of the pendency of this proceeding.

202. In light of the changes we are proposing, we seek comment on whether we should continue our current policy with regard to extension requests to construct facilities. If we should continue our current policy, should we make any changes? If so, we seek comment on the specific changes that we should make.

⁴⁹⁰ See, e.g., Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool Modification of FCC Rule Section 90.627(b) Governing Multiple Sites for Specialized Mobile Radio Service Systems In Rural Markets, *Order*, 8 FCC Rcd 3974 (1993); Requests by Interactive Video And Data Service Auction Winners to Waive the January 18, 1998, and February 28, 1998, Construction Deadlines, *Order*, 13 FCC Rcd 756 (WTB 1998); Requests by Interactive Video and Data Service Auction Winners to Waive the March 28, 1997 Construction Deadline, *Order*, 12 FCC Rcd 3,181, 3,184 (WTB 1997); Deferral of Rate of Return Represcription Filings Pursuant to Section 65.102(c) of the Rules, *Memorandum Opinion and Order*, 3 FCC Rcd 7,220, 7,222 (CCB 1988). Cf. *Channel 16 of Rhodel Island, Inc. v. FCC*, 440 F.2d 266, 275-76 (D.C. Cir. 1971).

⁴⁹¹ See, e.g. Daniel R. Goodman, Receiver; Dr. Robert Chan, *Memorandum Opinion and Order and Order on Reconsideration*, 13 FCC Rcd 21,944, 21972-973, 21977 ¶¶ 53.62 (1998).

15. Annual Reports

203. Our existing rules require MDS operators to file annual reports even if they are in full compliance with all of our rules.⁴⁹² We propose to eliminate this requirement because these reports do not appear to serve any purpose.

G. Application Processing

204. Currently, our MDS and ITFS application processing is cumbersome, time-consuming, and resource intensive. As noted above, we propose to replace the requirement to separately license individual transmitters with a geographic area licensing scheme in which most operations would be authorized under the geographic area license. We believe this change will substantially reduce the burdens on licensees, expedite the initiation of service, and provide greater flexibility. Nonetheless, we note that there will continue to be limited instances in which transmitters will have to be licensed individually. We therefore believe it is appropriate to review and streamline our application procedures.

205. With respect to the processing of ITFS applications, our **rules** require the opening of a filing window before we will accept **applications**.⁴⁹³ Then we must announce a one-week filing period for applications for major changes, high-power signal booster station, response station hub and R channels point-to-multipoint transmissions licenses. At the conclusion of the one-week filing period, we announce the tendering for filing of applications submitted during the filing window and provide a sixty-day filing window for applicants to amend their **applications**.⁴⁹⁴ At the end of the sixty-day filing window, we announce the acceptance for filing of all applications submitted during the initial window, as amended by the **applicants**.⁴⁹⁵ Opposing parties receive sixty days from the release of the public notice announcing the acceptance for filing of the applications to file a petition to deny against an **application**.⁴⁹⁶ On the sixty-first day, we grant the unopposed applications unless we notified the applicant that we were not granting the application. We are concerned that this process may result in delays to the public and hinders the efficient processing of ITFS applications. We seek comment on whether this concern is valid. Additionally, if this concern is valid, we seek comment on measures we may implement to streamline this process.

206. Although our MDS application processing procedures are different from the ITFS procedures, we seek comment on whether we should consolidate the MDS and ITFS application procedures. Generally, upon receipt of an MDS application, we give the application a file **number**.⁴⁹⁷ After preliminary review, we place those applications that appeared complete on public notice as

⁴⁹² 47 C.F.R. § 21.911.

⁴⁹³ See 47 C.F.R. § 74.911(c)(1), (d)

⁴⁹⁴ See 47 C.F.R. § 74.911(d) (amendments were permissible as long as they did not result in any increase in interference to any previously-proposed or authorized station, or to facilities proposed during the window. absent consent of the applicant for or licensee of the stations that would receive the additional interference).

⁴⁹⁵ See *id.*

⁴⁹⁶ See *id.*

⁴⁹⁷ See 41 C.F.R. § 21.26.

accepted for filing.⁴⁹⁸ However, with regard to MDS two-way application filings, we currently use a rolling one-day filing window.⁴⁹⁹ We announced the “tendering for filing” of applications submitted during the filing window.⁵⁰⁰ After a sixty-day period, we released a second public notice announcing those applications that we accepted for filing.⁵⁰¹ Although the MDS application filing procedures appear quicker, we are concerned that these procedures can be stream-lined as well. Accordingly, we seek comment on whether we should stream-line the MDS application procedures. If *so*, we seek comment on methods to stream-line these procedures and where possible to consolidate the procedures.

207. Previously, applicants could file and view their applications on-line using the Broadband Licensing System (BLS).⁵⁰² The BLS contained the licensing data for MDS and ITFS.⁵⁰³ The public could access the BLS via the Internet.⁵⁰⁴ This on-line access enables users to search and display MDS and ITFS application and station information including Internet display of granted station authorizations.⁵⁰⁵ Users could also view filed applications in the electronic format.”

208. On October 11, 2002, the Wireless Bureau suspended the electronic filing capabilities of the BLS in order *to* improve the integrity of data in the BLS, prepare for converting the ITFS and MDS services to the ULS, and facilitate future enhancements to electronic filing.” Although the BLS had some on-line capabilities, we believe that conversion of the data from BLS to ULS will improve the efficiency of filing applications, as well as searching for data on these services.

209. In this vein, we note that we require the majority of the wireless applicants to file their applications electronically using ULS. The ULS has eliminated the need for wireless carriers to file duplicative applications and has increased the accuracy and reliability of licensing information for

⁴⁹⁸ See *id.* Neither the assignment of a file number nor the listing on a public notice as accepted for filing indicates that the application has been found acceptable for filing or precludes the subsequent return or dismissal of the application if it is found defective or not in substantial compliance with the Commission’s rules. *Id.*

⁴⁹⁹ See Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, *Report and Order*, MM Docket No. 97-217, 13 FCC Rcd 19112, 19150 (1998); 47 C.F.R. § 21.27(d).

⁵⁰⁰ Commission Announces Initial Filing Window for Two-way Multipoint Distribution Service and Instructional Television Fixed Service, *Public Notice*, 15 FCC Rcd 5,850 (MMB 2000).

⁵⁰¹ 47 C.F.R. § 21.27(d).

⁵⁰² *Public Notice*, Mass Media Bureau Implements, May 30, 2000 (*BLS Implementation PN*)

⁵⁰³ *Id.*; see also, Wireless Telecommunications Bureau **Suspends** Electronic Filing for the Broadband Licensing System on October 11, 2002, *Public Notice*, 17 FCC Rcd 18,365 (2002) (*Electronic Filing Suspension PN*).

⁵⁰⁴ *BLS Implementation PN*.

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.*

⁵⁰⁷ *Electronic Filing Suspension PN*, 17 FCC Rcd at 18,365. We note that effective March 25, 2002, the Commission transferred the regulatory functions for the Services from the former Mass Media Bureau to the Wireless Telecommunications Bureau. Radio Services are Transferred from Mass Media Bureau to Wireless Telecommunications Bureau, *Public Notice*, 17 FCC Rcd 5077 (2002).

wireless services. Additionally, ULS has increased the speed and the efficiency of the application process because wireless licensees and applicants can file all licensing-related applications and other filings electronically. Since the implementation of ULS, the public may access all publicly available wireless licensing information on-line.⁵⁰⁸ Because ULS is interactive, ULS prompts the applicant to input the required information for the type of action that the applicant seeks. As a result, applicants must submit all the appropriate information before they may file their applications electronically in ULS.⁵⁰⁹ Notably, ULS will automatically “pre-fill” licensee information already in the system and will display only the portions of the form and schedules that require completion for the applicant’s or licensee’s indicated purpose.”

210. The Commission also created redundant systems and back up procedures to safeguard against loss of data or system access should a system failure occur.⁵¹¹ We believe that transitioning MDS and ITFS to ULS will have the same benefits for MDS and ITFS carriers, the public and the Commission. Accordingly, we seek comment on the changes needed to transition MDS and ITFS to ULS.

211. In light of the interactive nature of ULS to assist an applicant through the application process, we propose to streamline the licensing process.” Generally, upon filing of an application in ULS, we place the application on public notice as accepted for filing.⁵¹³ The extra step of allowing applicants to amend their applications to make corrections is not necessary with ULS. We seek comment on this proposal. In addition to the concerns noted above with regard to streamlining the ITFS and MDS application processes, we tentatively conclude that the interactive nature of ULS will enhance the on-line capabilities of MDS and ITFS users. Accordingly, we propose to integrate the Services into ULS. We seek comment on this proposal.

1. Returns and Dismissals of Incomplete or Defective Applications

212. As noted above,⁵¹⁴ in some instances ITFS and MDS applicants submitted applications that were incomplete or required the submission of additional information before they could be placed on public notice as accepted for filing. We propose to extend our uniform rule for dismissal or return of defective applications in the Wireless Services to ITFS and MDS applications.

⁵⁰⁸ ULS R&O, 13 FCC Rcd 21027, 21031 ¶ 4.

⁵⁰⁹ Phase I Mandatory Electronic Filing Deadline Extended for PCIA and ITA. **Public Notice**, 16 FCC Rcd 13,681 (2001) (the Commission extended the deadline for mandatory electronic filing to **July 25, 2001**).

⁵¹⁰ On-line help, including form instructions, is provided for electronic filers. Additionally, the FCC Technical Support Hotline is available Monday through Friday, 8 a.m. to 6 p.m. **All calls to the FCC Technical Support Hotline are recorded.** Wireless Telecommunications Bureau Grants Dismissal Requests of Eligible Auction No. 35 Winners and Dismisses Applications for Five C and F Block Broadband Personal Communications Services (PCS) Licenses, **Public Notice**, (DA 02-3585, rel. Dec. 24, 2002), Attachment B.

⁵¹¹ ULS R&O, 13 FCC Rcd 21027, 21031 ¶ 5.

⁵¹² See paras. 208-209 *supra*.

⁵¹³ See 47 C.F.R. § 1.933(1).

⁵¹⁴ See paras. 204-205 *supra*.

213. In the *ULS Report and Order*, the Commission adopted a uniform application dismissal and return rule in all the Wireless Services.” Pursuant to the uniform rule, the Commission indicated that it has the discretion to return applications for correction on minor filing errors, but it also has the authority to dismiss any incomplete or defective application without **prejudice**.⁵¹⁶ However, the Commission explained that it would automatically dismiss any application that is defective because the applicant failed to sign the application, failed to pay the required filing fee, or filed outside of the applicable filing **window**.⁵¹⁷ The Commission concluded that, in contrast to minor filing errors, such defects were “fatal to the consideration of the **application**.”⁵¹⁸ Accordingly, the Commission found that, regardless of the manner in which applicants submitted their applications, ULS would automatically dismiss “applications that were unsigned, untimely, or not fee-compliant.”⁵¹⁹

214. The Wireless Bureau announced specific procedures for complying with the Commission’s uniform **policy**.⁵²⁰ The Wireless Bureau explained that, “[g]enerally, timely filed renewal applications and construction notifications that are otherwise defective will be returned to the applicants for correction, rather than dismissed by the **Bureau**.”⁵²¹ However, the Bureau clarified “that renewal applications and construction notifications that fail to comply with the applicable fee and signature requirements will be dismissed by the Bureau as defective, rather than returned to the applicants for correction, even if timely **filed**.”⁵²² We propose to adopt this application dismissal and return policy for **MDS** and **ITFS** to ensure efficient processing and equal treatment of **all** applications. We invite comment on this proposal.

2. ULS Forms

215. The Commission consolidated the ULS application forms for wireless services to replace approximately forty-one application **forms**.⁵²³ The consolidation streamlined the processing of applications and reduced the filing burden for wireless applicants and licensees.” We use four forms in ULS – Form 601 (Long-Form or **FCC** Application for Wireless Telecommunications Bureau Radio

⁵¹⁵ See *ULS R&O*, 13 FCC Rcd 21,027; See also 47 C.F.R. § 1.934

⁵¹⁶ *ULS R&O*, 13 FCC Rcd at 21068 ¶ 90.

⁵¹⁷ *ULS R&O*, 13 FCC Rcd at 21068 ¶ 90.

⁵¹⁸ *Id.*

⁵¹⁹ See, e.g., *id.*

⁵²⁰ See *Wireless Telecommunications Bureau Clarifies Unified Policy for Dismissing and Returning Applications, Public Notice*, 17 FCC Rcd 30 (WTB 2001) (*Unified Dismissal and Return PN*); *Wireless Telecommunications Bureau Revises and Begins Phased Implementation of its Unified Policy for Reviewing License Applications and Pleadings, Public Notice*, 14 FCC Rcd 11182, 11185 (WTB 1999); *Wireless Telecommunications Bureau Announces Unified Policy for Dismissing and Returning Applications and Dismissing Pleadings Associated with Applications, Public Notice*, 14 FCC Rcd 5499 (WTB 1999).

⁵²¹ *Unified Dismissal and Return PN*, 17 FCC Rcd at 30.

⁵²² *Id.* at 32.

⁵²³ *ULS R&O*, 13 FCC Rcd 21,027, 21,033-21,034 ¶ 10.

⁵²⁴ *Id.*

Service Authorization), Form **602** (FCC Ownership Disclosure Information for the Wireless Telecommunications Bureau), Form **603** (FCC Wireless Telecommunications Bureau Application for Assignment of Authorization or Transfer of Control) and Form **605** (Quick-Form Applications for Authorization in the Ship, Aircraft, Amateur, Restricted and Commercial Operator, and General Mobile Radio Services).⁵²⁵ Currently, our rules require MDS and ITFS applicants to use eleven forms to request licensing actions.⁵²⁶ We tentatively conclude that we will use the ULS forms to license the Services. Accordingly, we seek comment on the changes to the forms that will be needed to accommodate these Services. In the paragraphs that follow, we delineate the purposes of the specific ULS forms and the forms that they will replace.

216. FCC Form 601. Under our proposal, this form will replace FCC Forms 304, 304A, 330, 330A, 330R, **331**, 405, **701** and most informal application filings. The **FCC Form 601** and associated schedules will be used to apply for initial authorizations, modifications (major and minor) to existing authorizations, amendments to pending applications, renewals of station authorizations, developmental authorizations, special temporary authorities (STAs), certifications of construction, requests for extension of time, cancellations, and administrative updates. The required schedules are:

- New/Modification/Amendment (Regular Authorizations, Developmental Authority and Special Temporary Authority) – FCC Form **601** Main Form with required technical schedule.
- Renewals/Cancellation/Administrative Updates – FCC Form **601** Main Form and Schedule **A** (if requesting multiple call signs).⁵²⁷
- Certifications of Construction – FCC Form **601** Main Form and Schedule **K**.
- Extension of Time to Construct – FCC Form **601** and Schedule **L**.

217. FCC Form 602. This form will replace the FCC Form 430 for the submission of initial and updated ownership information for those wireless radio services that require the submission of such information.⁵²⁸

218. FCC Form 603. This form will replace FCC Forms 305, **306** and **330**. Applicants use the FCC Form **603** and associated schedules to apply for consent to assignment of existing authorizations (including channel swaps), to apply for Commission consent to the transfer of control of entities holding authorizations, to notify the Commission of the consummation of assignments or transfers, and to request extensions of time for consummation of assignments or transfers. Additionally, applicants use the form to apply for partial assignments of authorization, including partitioning and disaggregation. The required schedules are:

- Assignment/Transfer of Control – FCC Form **603** Main Form and Schedule **A** for auctionable services.⁵²⁹

⁵²⁵ *Id.*

⁵²⁶ The MDS and ITFS application forms are FCC Forms **304**, **304A**, **305**, **306**, **330**, **330A**, **330R**, **331**, **405**, **430**, and **701**.

⁵²⁷ See 47 C.F.R. § 1.949 ~~for~~ the rules governing renewals.

⁵²⁸ See *supra* n.415; 47 C.F.R. § 0.408.

⁵²⁹ See 47 C.F.R. § 1.948.

- Partitioning & Disaggregation – FCC Form **603** Main Form and Schedule B or Schedule D as required.
- Consummation Notifications – FCC Form **603** and Schedule D.
- Extension of Time for Consummation – FCC Form **603** and Schedule E.

219. We believe that eliminating the current MDS and ITFS forms and implementing the ULS forms for MDS and ITFS will streamline the processing of applications and reduce the filing burden for MDS and ITFS applicants and licensees. We note that by using the ULS Forms, we will eliminate a number of obsolete MDS and ITFS **forms** from our **rules**.⁵³⁰ Accordingly, we propose to use the ULS forms for MDS and ITFS, thereby eliminating the current MDS and ITFS **forms**. We seek comment on this proposal.

3. Transition Periods

220. In light of the significant changes proposed to the ITFS and MDS forms and rules, we believe applicants and licensees should receive a transition period to familiarize themselves with ULS and begin using ULS forms. Accordingly, we propose to allow continued use of the current ITFS and MDS forms for a transition period of six months after the effective date ~~of~~ the release of a Report *and* Order in this proceeding. This period will provide ITFS and MDS applicants and licensees with sufficient time to familiarize themselves with ULS and to plan an orderly transition from using existing forms to using the ULS forms. At the conclusion of this period, we tentatively conclude that we will accept ULS forms only for these Services. This period is consistent with the transition period the Commission used with the initial implementation of ULS.⁵³¹

221. In the *ULS R&O*, the Commission provided a transition period for applicants and licensees to use ULS voluntarily before implementing mandatory electronic filing using the ULS forms.⁵³² Generally, the Commission determined that permitting a six-month transition period after application processing in ULS begins for a service before requiring mandatory electronic filing was appropriate.⁵³³ We believe the six-month transition period has worked reasonably well for the other services that have transitioned to ULS.⁵³⁴ Accordingly, we tentatively conclude that we will permit a six-month transition period after application processing in ULS begins before requiring mandatory electronic filing by MDS and ITFS applicants and licensees in ULS is appropriate. We invite comment on this tentative conclusion. As in the past, the Wireless Bureau will release a public notice announcing the relevant commencement date for the processing of the Services applications in ULS.⁵³⁵

⁵³⁰ See *e.g.* 47 C.F.R. §§ 73.3500, 73.3536 (elimination of all references to FCC Form 330-L, "Application for Instructional Television Fixed Station License"); 47 C.F.R. §§ 21.11(b); 73.3500; 73.3533(b) (elimination of all references to FCC Form 307). In addition, we propose to delete references to obsolete MDS forms mentioned in Part 74. See 47 C.F.R. § 74.991.

⁵³¹ *ULS R&O*, 13 FCC Rcd at 21027, 21038-21039 ¶ 16

⁵³² *Id.* at 21042-21043 ¶ 24.

⁵³³ *Id.*

⁵³⁴ *ULS R&O*, 13 FCC Rcd 21027 (1998) at 21042-3, ¶ 22-4

⁵³⁵ See, *e.g.*, **Public** Notice: Wireless Telecommunications Bureau to Begin Use of Universal Licensing System (ULS) for Microwave Services (DA 99-154, rel. Aug. 30, 1999).

222. We anticipate that **ITFS** and **MDS** operators will find the application and renewal process with the ULS to be easier and less error-prone than with the existing system. Before implementing the electronic ULS, the Commission established a task force to receive public input on the design of the system and to coordinate efforts. Consistent with the WTB's approach in implementing other services into ULS, Commission staff will conduct interactive demonstrations for licensees and their representatives on the proper use of the system for filing license applications and conducting database research. Such demonstrations will be announced by public notice and will include topics such as: (1) finding information in ULS for license and application searches; (2) filing and researching license transfers and assignments; and (3) general application filing procedures.

223. We also note that the WTB has ongoing initiatives designed to familiarize Commission licensees with the ULS and give notice of upcoming changes thereto. For instance, the WTB periodically updates its "ULS Newsletter" on the WTB web site to provide the public with current information on ULS and related topics of interest.⁵³⁶ The WTB maintains an electronic mail list of interested parties, which are provided with updated ULS information free of charge. The WTB also maintains a toll-free phone line⁵³⁷ to assist with licensing questions during the ULS transition and has established a technical support hotline (and e-mail address)⁵³⁸ to assist the public with computer-related issues, including set-up and configuration.

224. To ensure that existing and potential licensees will be comfortable with the integration of MDS and **ITFS** into the ULS, we intend to pursue a variety of outreach efforts similar to those we have followed in the past when bringing new classes of licenses into the ULS. The WTB has operated booths at many industry trade shows, providing hands-on training regarding use of the Commission's ULS and auction bidding software over the Internet. The Commission's outreach program also includes a web page and telephone hot lines. Members of the Commission and its staff have spoken at numerous industry, trade association, public interest organization, and telecommunications user group conferences on opportunities in wireless services licensed by the Commission, and will continue to do so.⁵³⁹ We also solicit comment on additional means by which we can afford MDS and ITFS licensees opportunities to become educated about and familiar with ULS and the new application procedures we adopt in this proceeding.

225. We note that the MDS/ITFS community requests clarification that it may use the FCC Form **331** for all modification applications for existing stations, whether main stations, boosters, or response station hubs, and that it should use the FCC Forms **304** and **330** only for applications for new stations.⁵⁴⁰ Although the MDS community seeks a clarification that it may use FCC Form 331 to modify existing stations, whether main stations, booster stations or response stations, we believe that MDS

⁵³⁶ See *Section 257 Report to Congress: Identifying and Eliminating Market Entry Barriers For Entrepreneurs and Other Small Businesses*, 15 FCC Rcd. 15,376, 15,408, ¶ 77 (2000) ("*Section 257 Report*"). A list of FCC Public Notices concerning ULS is available on the WTB ULS Homepage at www.fcc.gov/wtb/uls.

⁵³⁷ The toll-free number regarding ULS questions is 1-888-CALL-FCC, option 2.

⁵³⁸ The Technical Support telephone no. is 202-414-1250 and the e-mail address for ULS technical questions is ulstech@fcc.gov.

⁵³⁹ See *Section 257 Report* at 15,407-15,408, ¶ 76.

⁵⁴⁰ Memorandum to WCA Government Relations Committee from Paul J. Sinderhrand, Esq., Petition for Rulemaking - Amendment of Parts 21 and 74. page 3, August 1, 2001.

applicants should use FCC Form 601, upon adoption of final rules, to ensure a smooth transition to ULS. We seek comment on this concern.

4. Suspension of Acceptance and Processing of Applications

226. In light of our actions described above, and effective as of the date of the release of this *NPRM & MO&O*, we will suspend acceptance of applications for ITFS channels for new licenses, amendments or modifications for any kind of station temporarily, except as provided below. The suspension is effective until further notice and applies to applications received on or after the date of release of this *NPRM & MO&O*. Any such applications received after the deadline will be returned as unacceptable for filing. We take this action to permit the orderly and effective resolution of issues in this proceeding. Absent this action, applications for new licenses, amendments, and modifications might limit the effectiveness of the decisions made and the standards developed in this proceeding. We note this action is consistent with the approach we have taken in other existing services where we have proposed to adopt geographic area licensing.⁵⁴¹ We therefore find that this temporary measure is in the public interest.

227. Notwithstanding this temporary suspension, we will continue to process applications for ITFS channels that involve minor modifications, assignment of license or transfer of control.⁵⁴² This exception should permit modifications that can improve the efficiency of incumbent operations on these channels without affecting the effective and orderly resolution of the issues in this proceeding. Again, we will continue to accept applications for minor modifications, license assignments and transfers of control under existing procedures.

228. With respect to pending ITFS applications that were filed prior to the release date of this *Notice of Proposed Rulemaking*, and which are pending, we will process such applications provided that they are not mutually exclusive with other applications as of the deadline stated above. We believe that this approach gives the appropriate consideration to those applicants who filed applications prior to our proposed changes and whose applications are not subject to competing applications. We note that we used this approach in other services where we have proposed a transition to geographic area licensing.⁵⁴³ If applicants have filed settlement agreements prior to the release date of the *Notice of Proposed Rulemaking*, and such settlement agreements comply with our rules, we will act on the settlement agreements. If we approve such a settlement agreement, we will allow the processing and grant of the remaining non-mutually exclusive applications. We will not accept settlement agreements relating to mutually exclusive ITFS applications that are filed after the release date of this *Notice of Proposed Rulemaking*. With respect to applications for ITFS stations filed prior to the adoption of this *Notice of*

⁵⁴¹ See *e.g.*, Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Notice of Proposed Rule Making*, WT Docket No. 96-18, PP Docket No. 93-253, 11 FCC Rcd 3108 (1996). See also, Amendment of the Rules Regarding Multiple Address Systems, WT Docket No. 97-81, *Notice of Proposed Rule Making*, 12 FCC Rcd 7973 (1997).

⁵⁴² The Commission reserves the right to classify amendments as major or minor on a case-by-case basis. Unless the Commission determines otherwise in a specific case, a minor amendment is an amendment that does not fall within the Commission's definition of a major amendment, which is codified at 47 C.F.R. §21.23(c). See also n.371.

⁵⁴³ See, *e.g.*, Amendment of the Commission's Rules Regarding Maritime Communications, PR Docket No. 92-257, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 12 FCC Rcd 16949, 17015-17016 (1997).

Proposed Rulemaking that do not meet the above criteria, we tentatively conclude that we will dismiss such applications without prejudice upon adoption of a *Report and Order* in this proceeding. Any commenters proposing that we retain such applications should address how such applications should be processed, particularly in the event of any auction for spectrum covered by the application.⁵⁴⁴ This action would be consistent with our treatment of pending applications in other services that we have converted to geographic area licensing.⁵⁴⁵ While we are proposing to convert ITFS to geographic area licensing, the pending applications were filed in response to a site-based licensing scheme. We seek comment on this tentative conclusion.

229. These decisions are procedural in nature and therefore not subject to the notice and comment and effective date requirements of the Administrative Procedure Act.⁵⁴⁶ Moreover, there is good cause for proceeding in this manner: to do otherwise would be impractical and contrary to the public interest because compliance would undercut the purpose of these interim measures.⁵⁴⁷ It is well-established that the Commission may initiate a **freeze** without prior notice and hearing when the purpose is the “creation of conditions under which **formal** rulemaking proceedings can be held in an effective, efficient, and meaningful manner.”⁵⁴⁸ In this particular instance, we are undertaking a comprehensive review of the services to provide licensees maximum operational flexibility with minimal regulatory restrictions. Because we seek comment on virtually every area related to the services, we believe that it is appropriate to suspend the acceptance and processing of applications.

H. Competitive Bidding Procedures

230. Competitive Bidding Authority. As discussed earlier in this *NPRM & MO&O*, the Commission determined in prior proceedings that the statutory mandate to use competitive bidding to resolve mutually exclusive applications for licenses applies to **MDS**⁵⁴⁹ and **ITFS**⁵⁵⁰ applications under

⁵⁴⁴ See, *infra*, para. 231, regarding participation in auctions for licenses to use ITFS spectrum in currently unassigned areas.

⁵⁴⁵ See, e.g., Amendment of the Commission’s Rules Regarding Maritime Communications, PR Docket No. 92-257. *Second Memorandum Opinion and Order and Fifth Report and Order*, 17 FCC Rcd 22585, 6720 ¶ 83 (2002).

⁵⁴⁶ See 5 U.S.C. §§ 553(b)(A), (d); *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir 1963).

⁵⁴⁷ See 5 U.S.C. §§ 553(b)(B), (d)(3)

⁵⁴⁸ See Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 Bands, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, ET Docket No. 95-183, PP Docket No. 93-253, 12 FCC Rcd 2910.2915 ¶ 10 citing *Kessler v. FCC*, 326 F. 2d 673, 679-81 (D.C. Cir. 1963).

⁵⁴⁹ See *supra*, para. 22

⁵⁵⁰ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Reexamination of the Policy Statement on Comparative Broadcast Hearings, Proposals to Reform the Commission’s Comparative Hearing Process to Expedite the Resolution of Cases, MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264, *First Report and Order*, 13 FCC Rcd 15,920, 15,998-16,004 (1998) (“*Competitive Bidding for ITFS Licenses First Report and Order*”), *recon. granted in part, Memorandum Opinion and Order*. 14 FCC Rcd 8,724 (1999) (in relevant part, granting ITFS applicants in future auctions a post-short-form settlement period and clarifying that the new entrant bidding credit will not be applied in any ITFS auction), *and rule modified in parr*, 14 FCC Rcd 12,541 (continued....)

current service rules. As the Commission recognized, Congress has mandated expressly that “if ‘mutually exclusive applications are accepted for *any* initial license or construction permit, then, *except as provided in paragraph (2)* [of 47 U.S.C. §309(j)], the Commission *shall* grant the license or permit to a qualified applicant through a system of competitive bidding[.]”⁵⁵¹ The Commission originally concluded that neither MDS nor ITFS come within any of paragraph 2’s exceptions for “public safety radio services;” for initial digital television licenses given to existing broadcast licenses to replace analog televisions licenses; and for “noncommercial educational broadcast” and “public broadcast” stations, as those terms are defined in 47 U.S.C. §397(6).⁵⁵² The changes proposed in this *NPRM & MO&O* will not bring MDS or ITFS licenses within any of these exceptions, which Congress has not changed or expanded. Accordingly, we must use competitive bidding to resolve mutually exclusive applications for licenses in these bands.

231. *Participation in Auctions for Licenses to Use ITFS Spectrum in Currently Unassigned Areas.* What parties may participate in an auction for licenses to use ITFS spectrum in currently unassigned areas is a distinct question from what parties should be eligible to hold ITFS spectrum licenses.⁵⁵³ Citing prior Commission proceedings, the Coalition proposes that participation in such an auction should be limited solely to parties with pending applications for licenses associated with unassigned ITFS spectrum.⁵⁵⁴ Previously, the Commission observed that “it would not serve the public interest to accept additional competing ITFS applications despite our authority to do so under Section 309(j)(1),” and therefore the only “eligible bidders in any auction of the pending ITFS applications” ought to be “those with applications already on file.”⁵⁵⁵ However, this prior observation applied solely with respect to “any auction of the *pending ITFS applications*[.]” Pursuant to this *NPRM & MO&O*, and consistent with the Coalition proposal, we now are considering an auction of new licenses for using ITFS spectrum in geographic areas that will encompass currently unassigned areas. As noted previously, geographic area licensing will give licensees greater operational flexibility to modify, move, and add to their facilities, which may improve spectrum utilization.⁵⁵⁶ In addition, this greater operational flexibility may result in new and competing proposals for utilizing the public spectrum resource from parties not previously involved in pending site-based licensing applications. Applicants intending very different uses of these more flexible licenses can express the respective values a particular license has for their intended use in easy to compare competitive bids. This enables the Commission rapidly to assign licenses to parties that will put them to their highest value use. However, an auction must be open to all parties qualified to use the license in order to assign the license to the party that most highly values it.⁵⁵⁷ We seek comment on whether the Commission should adopt the Coalition’s plan or open participation to

(Continued from previous page) _____

(1999) (modifying rules regarding attribution of ownership for determining eligibility for new entrant bidding credit).

⁵⁵¹ *Competitive Bidding for ITFS Licenses First Report and Order*, 14 FCC Rcd at 15,999 n.245 (quoting and adding emphasis to 47 U.S.C. § 309(j)(1)).

⁵⁵² See 47 U.S.C. § 309(j)(2)

⁵⁵³ See *supra*, paras. 107-117.

⁵⁵⁴ White Paper at 41 and n.111 (quoting 13 FCC Rcd at 16,002).

⁵⁵⁵ *Id.*

⁵⁵⁶ See *supra*, para. 62.

⁵⁵⁷ See generally Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report And Order*, 9 FCC Rcd 2348, 2360-2361, ¶¶ 70-71 (1994).

any party eligible to hold a geographic license. We note that, in either case, if the Commission determines that only educational institutions may hold ITFS licenses, then only those institutions may participate in any auction of **ITFS** licenses. We further *seek* comment on any special challenges associated with governmental educational institutions or non-governmental non-profit educational institutions participating in auctions. Commenters proposing that auction participation be restricted to fewer than all parties eligible to be licensees should address how any such restrictions are consistent with the statutory policy objectives **of** the Commission's competitive bidding **authority**.⁵⁵⁸

232. **Potential Auctions.** As discussed further below, we seek comment on three alternative potential auctions: an auction of new licenses to use ITFS spectrum in currently unassigned areas; a two-sided auction to restructure the ITFS spectrum with new licenses; and a two-sided auction to restructure the **MDS** and ITFS spectrum with new licenses. The term "two-sided auction" generally refers to auctions with multiple sellers and buyers. It is used here to refer to a Commission auction of licenses that makes available rights to previously unassigned spectrum, held by the Commission, and rights to spectrum previously licensed. In such a "two-sided auction," incumbent licensees may bid on licenses that include licenses associated with spectrum previously licensed to them. As discussed further below, a restructuring auction would attempt to further the public interest in efficient and intensive use of the spectrum by bringing together all parties that may have an interest in rights in the ITFS and MDS spectrum, including incumbent licensees and prospective new licensees. Each of the potential auctions would include licenses to use ITFS spectrum in currently unassigned areas and, accordingly, procedures proposed for the auction **of** such licenses will apply to any of the three potential auctions, with modifications noted below for two-sided auctions in the latter two cases.

I. An Auction of Currently Unassigned ITFS Spectrum

233. **Auction Procedures.** We request comment on a number of issues relating to competitive bidding procedures that could be used to assign licenses by auction for ITFS spectrum in areas not covered by any incumbent licenses. If we decide on any auction approach, we propose to conduct any auction of licenses to use spectrum in the **2500-2690** MHz band in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's rules, and substantially consistent with the bidding procedures that have been employed in previous auctions.⁵⁵⁹ Specifically, we propose to employ the Part 1 rules governing, among other things, competitive bidding design, designated entities, application and payment procedures, collusion issues, and unjust enrichment.⁵⁶⁰ Under this proposal, such rules would be subject to any modifications that the Commission may adopt in our Part 1 proceeding.⁵⁶¹ In addition, consistent with current practice, matters such as the appropriate competitive

⁵⁵⁸ See 47 U.S.C. § 309(j)(3).

⁵⁵⁹ See, e.g., Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686 (1997); *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997) (*Part I Third Report and Order*); *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293 (2000) (*recon. pending*) (*Part I Recon Order/Fifth Report and Order and Fourth Further Notice of Proposed Rule Making*); *Seventh Report and Order*, 16 FCC Rcd 17546 (2001); *Eighth Report and Order*, 17 FCC Rcd 2962 (2002).

⁵⁶⁰ See 47 C.F.R. § 1.2101 et seq.

⁵⁶¹ See *Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293 (2000); see also *Part I Recon Order/Fifth Report and Order*, 15 FCC Rcd 15293 (*recon. pending*).

bidding design for the auction of ITFS licenses, as well as minimum opening bids and reserve prices, would be determined by the Wireless Telecommunications Bureau pursuant to its delegated authority.⁵⁶² We seek comment on whether any of our Part 1 rules or other auction procedures would be inappropriate or should be modified for an auction of ITFS licenses.

234. **Designated Entities.** In authorizing the Commission to use competitive bidding, Congress mandated that the Commission “ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.”⁵⁶³ In addition, section 309(j)(3)(B) of the Act provides that in establishing eligibility criteria and bidding methodologies, the Commission shall promote “economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.”⁵⁶⁴

235. The Commission’s existing designated entity provisions apply based on an entity’s qualification as a small business.⁵⁶⁵ We note that minority- and women-owned businesses and rural telephone companies that qualify as small businesses may take advantage of the special provisions we have adopted for small businesses.⁵⁶⁶ We seek comment on whether our small business provisions are sufficient to promote participation by business owned by minorities and women, as well as rural telephone companies.⁵⁶⁷ To the extent that commenters propose additional provisions to ensure participation by minority- or women-owned businesses, or rural telephone companies, they should address how such provisions should be crafted to meet the relevant constitutional standards.

236. We seek comment on the appropriate definition(s) of small business that should be used to determine eligibility for bidding credits in auctions involving ITFS spectrum. In the *Competitive*

⁵⁶² See Amendment of Part 1 of the Commission’s Rules - Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 448-49, 454-55, ¶¶ 125, 139 (directing the Bureau to seek comment on specific mechanisms relating to auction conduct pursuant to the Balanced Budget Act of 1997) (*Part I Third Report and Order*).

⁵⁶³ See 47 U.S.C. § 309(j)(4)(D).

⁵⁶⁴ See 47 U.S.C. § 309(j)(3)(B).

⁵⁶⁵ See 47 C.F.R. § 1.2110(a). Although the Commission previously extended designated entity preferences to minority- and women-owned businesses, as well as to small businesses, following the Supreme Court’s rulings in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), and *United States v. Virginia, et al.*, 518 U.S. 515 (1996), the Commission concluded that it would not be appropriate to adopt special provisions for minority-owned and women-owned businesses pending the development of a more complete record on the propriety of race- and gender-based provisions for future auctions. See *Part I Fifth Report and Order*, 15 FCC Rcd at 15318-20, ¶¶ 45-50 (discussing constitutional standards and governmental interests that would justify the use of race- or gender-based preferences).

⁵⁶⁶ See *Part I Fifth Report and Order*, 15 FCC Rcd at 15319, ¶ 48; see also FCC Report to Congress on Spectrum Auctions, WT Docket No. 97-150, *Report*, FCC 97-353 at 29 (rel. Oct. 9, 1997) (finding that special provisions for small businesses also increase opportunities for minority- and women-owned businesses).

⁵⁶⁷ We recently issued a Notice of Inquiry seeking information about the effectiveness of our provisions to promote participation by rural telephone companies in our competitive bidding proceedings. See *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, *Notice of Inquiry*, FCC 02-325 (rel. Dec. 20, 2002).

Bidding Second Memorandum Opinion and Order, the Commission stated that it would define eligibility requirements for small businesses on a service-specific basis, taking into account the capital requirements and other characteristics of each particular service in establishing the appropriate threshold.⁵⁶⁸ The *Part 1 Third Report and Order*, while it standardizes many auction rules, provides that the Commission will continue a service-by-service approach to defining small businesses.⁵⁶⁹ Generally, when establishing service-specific small business size standards, we look to the capital required to provide likely service using the spectrum. We do not know the precise type of service that new licensees may attempt to provide in this band. The Coalition has suggested that the ITFS and MDS bands may be used to provide ubiquitous broadband services using next generation low power, cellular systems on fixed, portable and/or mobile bases.⁵⁷⁰ We invite comment on whether likely services in this band will have capital requirements similar to current **MDS** services; or similar to mobile services, such as Personal Communications Services; or similar to fixed services, such as services in the **24 GHz** and **39 GHz** bands.

237. Further, we invite comment *on* whether distinctive characteristics of licensees in the ITFS band require distinct rules for assessing the relative size of potential participants in an ITFS auction. In this regard, current ITFS eligibility rules would limit participation in an auction of ITFS licenses for which there are mutually exclusive applications to accredited educational institutions, governmental organizations engaged in the formal education of enrolled students, and nonprofit educational organizations providing educational and instructional television materials to such accredited institutions or governmental organizations.⁵⁷¹ How do **our** designated entity provisions comport with the unique challenges and status of educational institutions? Should we establish special provisions for non-profit educational institutions that may want to have access to ITFS spectrum but do not have the financial capability to compete in an auction for spectrum licenses? Commenters that propose special provisions for non-profit educational institutions should address the statutory basis for such proposals. **Our** standard schedule of small business bidding credits provides for bidding credits based on a calculation of bidders' average annual gross revenues for the three years preceding the auction.⁵⁷² We seek comment on whether the non-commercial character of current ITFS licensees requires any special procedures for determining the average annual gross revenues of such entities. For example, are our standard gross revenue attribution rules an appropriate method of evaluating the relative resources of universities and government entities? We also invite comment on whether some other criterion besides average annual **gross** revenues should be used for identifying small entities among eligible ITFS applicants.

238. Similarly, if current or revised licensee eligibility rules significantly limit parties eligible to participate in an ITFS auction, would distinguishing among eligible entities to grant bidding credits to

⁵⁶⁸ Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93-253, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245, 7269 ¶ 145 (1994) (*Competitive Bidding Second Memorandum Opinion and Order*); 47 C.F.R. § 1.2110(c)(1).

⁵⁶⁹ *Part 1 Third Report and Order*, 13 FCC Rcd at 388 ¶ 18; 47 C.F.R. § 1.2110 (c)(1).

⁵⁷⁰ See white Paper at I I

⁵⁷¹ See 47 C.F.R. § 74.932, 990-992. Wireless cable entities may be eligible to obtain licenses for ITFS frequencies if there are no mutually exclusive ITFS applications. 47 C.F.R. § 74.990(e).

⁵⁷² See 47 C.F.R. § 1.2110(b).

small entities serve the statutory purpose of bidding credits?⁵⁷³ We tentatively conclude that if the eligibility of parties to hold ITFS licenses is determined by their educational purpose, providing bidding credits based on the relative size of participants may not serve statutory purposes. We seek comment on this tentative conclusion.

239. In the event that participation in an ITFS auction is not significantly limited by eligibility restrictions, should our standard schedule of bidding credits should be applied to this service? In the *Part 1 Third Report and Order*, we adopted a standard schedule of bidding credits for certain small business definitions, the levels of which were developed based on our auction experience.⁵⁷⁴ The standard schedule appears at Section 1.2110(f)(2) of the Commission's rules.⁵⁷⁵ Are these levels of bidding credits appropriate for ITFS? Will they provide adequate opportunities for small businesses of varying sizes and for educational institutions, especially governmental and non-profit institutions, to participate in spectrum auctions that are open to a wide variety of participants.⁵⁷⁶ For this proceeding, we propose to apply this standard schedule and define an entity with average annual gross revenues not exceeding \$40 million for the preceding three years as a "small business;" an entity with average gross revenues not exceeding \$15 million for the same period as a "very small business;" and an entity with average gross revenues not exceeding \$3 million for the same period as an "entrepreneur."⁵⁷⁷ We propose to provide qualifying "small businesses" with a bidding credit of 15%, qualifying "very small businesses" with a bidding credit of 25%; and qualifying "entrepreneurs" with a bidding credit of 35%, consistent with Section 1.2110(f)(2).⁵⁷⁸ We seek comment on this proposal.

240. Given the close relationship between MDS and ITFS, we invite comment on the effect of having three small business sizes, and bidding credits, in ITFS while having only one small business size (average annual gross revenues for the preceding three years not exceeding \$40 million) and one credit (15%) in MDS.⁵⁷⁹ Commenters proposing alternative business size standards should give careful consideration to the likely capital requirements for developing services in this spectrum. In this regard, we note that new ITFS licensees may be presented with issues and costs involved in transitioning incumbents and developing markets, technologies, and services. Commenters also should consider whether the band plan and characteristics of the ITFS band suggest adoption of other small business size definitions and/or bidding credits in this instance.

⁵⁷³ Cf. Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Sixth Report and Order and Order on Reconsideration*, WT Docket No. 97-82, FCC 00-313, 15 FCC Rcd 16266, 16288, ¶ 45 (2000).

⁵⁷⁴ See *Part 1 Third Report and Order*, 13 FCC Rcd at 403-04, ¶ 47.

⁵⁷⁵ See 47 C.F.R. § 1.2110(f)(2).

⁵⁷⁶ See *Parr 1 Third Report and Order*, 13 FCC Rcd at 404, 147.

⁵⁷⁷ See 47 C.F.R. § 1.2110(f)(2). We note that we will coordinate the small business size standards for ITFS in this proceeding with the U.S. Small Business Administration.

⁵⁷⁸ 47 C.F.R. § 1.2110(f)(2)(i)-(iii)

⁵⁷⁹ See 47 C.F.R. § 21.961(b).

J. Two-sided Auctions to Restructure Spectrum

241. The Commission could conduct a two-sided auction to restructure spectrum to bring together all parties interested in rights to ITFS spectrum, and MDS spectrum as well, including incumbent licensees and prospective new licensees?" Making available in a single auction new licenses to use ITFS spectrum in currently unassigned areas along with spectrum made available by incumbent ITFS licensees, and potentially incumbent MDS licensees as well, would enable interested parties to restructure the band rapidly by helping them learn the cost of combining and obtaining encumbered and unencumbered spectrum for new uses, without engaging in costly and time consuming bilateral and multi-lateral negotiations.⁵⁸¹ Thus, a restructuring auction could facilitate the voluntary clearing of spectrum by incumbent licensees and allow the Commission to issue new licenses, that more efficiently aggregate spectrum rights and/or spectrum blocks with rights and blocks associated with existing licenses.

242. Conducting a two-sided restructuring auction may raise novel issues related to competitive bidding. To the extent a restructuring auction offers new initial licenses to all interested parties, we conclude that we can conduct such an auction consistent with our mandate and authority under Section 309(j).⁵⁸² To the extent that our auction process provides private parties with a secondary market for existing licenses that enhances the final license assignment in a simultaneous auction of new licenses, we believe that we can design such an auction consistent with our mandate and authority under

⁵⁸⁰ As noted previously, *see, supra*, para. 232, this potential auction would include licenses to use ITFS spectrum in currently unassigned areas and procedures proposed with respect to the auction of such licenses would be applicable to this auction as well. A recent working paper published by the Commission discusses how such two-sided auctions can be used to transition rapidly from existing spectrum band plans and policies to new plans and more flexible policies. *See, generally*, Evan Kwerel and John Williams, 2002, "A Proposal for a Rapid Transition to Market Allocation of Spectrum" Office of Plans and Policy Working Paper No. 38, Federal Communications Commission. In the case of ITFS and MDS spectrum, such an auction should be open to all parties that may be eligible to hold a license to use the spectrum in order to best determine the market price. Otherwise, the auction price may not reflect significant demand for licenses.

⁵⁸¹ For example, an entity planning to use ITFS spectrum to provide mobile services in a geographic area pursuant to newly proposed service rules currently has to obtain the license to use any spectrum previously not authorized for use in that area and has to negotiate with each incumbent licensee within the relevant area. The complexity of these negotiations likely will increase dramatically with their number, as each incumbent licensee seeks to obtain terms at least as good as all the others. Moreover, competitors seeking the spectrum for similar or other uses may enter into negotiations with the licensees. If so, it is quite possible that the circumstances of negotiation, rather than the relative value of the rights to the spectrum, may determine its final use. Even if the negotiations are successful, they likely will take considerable time, potentially delaying deployment of new services to the public and burdening the business plans of all the parties involved. In contrast, in an auction to restructure the band, the party planning new services can easily determine the current high bids for each license that covers the relevant geographic area and decide whether or not to proceed in a very short period of time.

⁵⁸² See 47 U.S.C. § 309(j). The Commission's statutory authority to grant licenses through a system of competitive bidding extends to initial licenses for use of the spectrum. In an auction to restructure the band, the Commission would make available initial licenses to use the spectrum pursuant to new service rules. New service rules would be applicable, regardless of whether the entire band plan has been revised. Thus, any restructuring auction would offer new licenses, whether conducted without, before, or after the adoption of a new band plan. The spectrum associated with these new initial licenses would include both spectrum previously licensed for use under prior service rules, if the licensees have exchanged their original licenses, and spectrum not previously authorized for use.

Sections 1, 4(i) and 303® of the Communications Act.⁵⁸³ We further seek comment on the feasibility and effectiveness of a two-sided “restructuring” auction conducted by the FCC, both as described briefly below and as any commenters may propose.⁵⁸⁴ We invite discussion of whether alternative mechanisms, such as privately conducted secondary market auctions, can or should be employed in conjunction with any FCC restructuring auction.⁵⁸⁵ Commenters should identify the components of any proposals that they believe are essential to an effective restructuring auction, the Commission’s authority to conduct an auction such as they propose, and also discuss the probable effect of modifying any significant components. Commenters should consider whether a private party could effectively conduct a two-sided auction involving existing licenses or otherwise facilitate restructuring the band and the likely efficiency of such a private secondary market auction compared to one conducted by the FCC that also includes unassigned ITFS spectrum. Could a private auction be conducted in coordination with a government auction? Are there any regulatory barriers to a privately conducted auction?

243. A restructuring auction may enable a transition to a more efficient and intensive use of the ITFS and MDS spectrum by enabling parties to aggregate spectrum blocks that serve their specific needs. The Commission could conduct a restructuring auction in conjunction with or as an alternative to the transition mechanisms previously discussed. Accordingly, we seek comment on whether a non-auction transition mechanism to a new band plan (such as that proposed by the Coalition) is essential to achieving more efficient and intensive use of this spectrum or whether a restructuring auction alone could achieve our objectives. If a two-sided restructuring auction is sufficient, should any aspect of the band plan be reconsidered? For example, if a restructuring auction is conducted to transition to a new band plan, would it be appropriate to modify the amount of spectrum associated with each license? Are six megahertz channels the most efficient size to auction, if an auction makes available large amounts of spectrum and permits the bidders to create customized spectrum blocks? If a two-sided restructuring auction is used in conjunction with one of transition mechanisms discussed above, we seek comment on whether the restructuring auction should take place before, or after, the non-auction transition.

1. A Two-sided Auction to Restructure the ITFS Spectrum

244. We seek comment on whether to conduct a two-sided auction to restructure the ITFS band that includes ITFS spectrum in areas covered by existing licenses, provided that incumbent licensees are willing to return their licenses and receive payments, along with ITFS spectrum in areas not

⁵⁸³ See 47 U.S.C. §§ 151, 154(i), and 303(r)

⁵⁸⁴ We note that 47 U.S.C. § 309(j)(8) requires that “all proceeds from the use of a competitive bidding system under this subsection shall be deposited in the Treasury in accordance with chapter 33 of title 31, United States Code.” Accordingly, any two-sided auction must be designed so that payments made to incumbent licensees are not “proceeds from the use of competitive bidding” within the meaning of Section 309(j)(8) or moneys required to be deposited in the Treasury by 31 U.S.C. § 3301 *et seq.*

⁵⁸⁵ The Commission continues to explore innovative policies and mechanisms that may further its spectrum management objectives. For example, the Commission has found that privately-conducted secondary auctions or other such market-oriented mechanisms could be used to facilitate the voluntary clearing of incumbent broadcasters from the 700 MHz bands and promote the early recovery of that spectrum for new uses. See, e.g., Service Rules for the 746-776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 99-168, Carriage of the Transmissions of Digital Broadcast Stations, CS Docket No. 98-120. Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television, MM Docket No. 00-39, **Third Report and Order**, 16 FCC Rcd 2703, 2718-2721, ¶¶ 37-44 (2001). The Commission also considered employing a Commission-conducted secondary auction in the 700 MHz bands, but ultimately decided that a privately-organized clearing mechanism would be better in that context. See *id.*

currently licensed. The effectiveness of a restructuring auction will depend in part on incumbent ITFS licensees' willingness to participate. The Commission might facilitate participation by allowing incumbent licensees to receive value from winning bidders for their incumbent licenses. Such a mechanism should determine the amount incumbent licensees would receive from winning bidders to clear the spectrum. For winning bids for use of spectrum associated with one incumbent license, the incumbent licensee could receive the full amount of the winning bid directly from the buyer in return for the incumbent's transfer of its license to the buyer (subject, of course, to Commission approval under Section 310(d) of the Communications Act). The licensee would be free to use this payment as it sees fit, *e.g.*, to purchase less expensive spectrum and pay the costs of relocating, or to purchase new equipment, or to finance projects unconnected with ITFS. During the auction, incumbents dissatisfied with the amount they would receive based on current high bids for their license could place a higher bid. If, at the end of the auction, the incumbent licensee is the high bidder, the incumbent would "pay" themselves the amount of their final bid and retain their license at no net cost. In the unlikely event that no one bid on their license or a winning bidder defaults on its bid, the incumbent licensee would retain its license. These protections would enable incumbent licensees to participate in the two-sided auction without committing to giving up the spectrum. Incumbent licensees could obtain valuable information about market prices during the course of the auction which could result in a more efficient use of the licensee's resources and the public spectrum resource.

245. The effectiveness of a two-sided restructuring auction depends in part on clearly defining the spectrum rights associated with a license. If the winner of a license for ITFS spectrum in currently unassigned areas (geographic licensee) also wins an existing ITFS license encompassed by the geographic license, the incumbent license would be subsumed within the geographic license. It is also important to clearly identify the parties that may have rights with respect to spectrum associated with existing licenses. Multiple parties, including licensees and their lessees, may assert claims to ITFS spectrum associated with existing licenses. Potential claims by lessees may inhibit incumbent licensees from offering existing licenses in an auction. Even if they want to do so, licensees and lessees may be unable to resolve potential claims due to pre-auction uncertainty regarding the value of the license and the lease; the cost of replacement spectrum; and/or the cost of new or retuned equipment. Any disputed claims among such parties could reduce bidders' certainty that they will receive all the rights associated with the licenses. If such uncertainty deters participation in a restructuring auction, the restructuring auction may be less effective at assigning the new licenses to parties that value them most highly. Consequently, the restructuring auction must take potential claims into account, regardless of the ultimate validity of such claims. We seek comment on the extent and nature of probable claims and their effect, if any, on the interest of potential bidders in a restructuring auction. Are there rules that could be applied to all parties, subject to separately negotiated agreements, that would resolve uncertainty surrounding potential claims and facilitate the sale of existing licenses?

2. A Two-sided Auction to Restructure the MDS and ITFS Spectrum

246. If a two-sided restructuring auction is feasible, we also could consider restructuring both the MDS and ITFS spectrum in one auction. Including MDS spectrum in such a two-sided restructuring auction would further enhance the opportunities for parties to learn the cost of combining and obtaining encumbered and unencumbered spectrum for new uses, all without engaging in costly and time consuming bilateral and multi-lateral negotiations. It also might reduce the need for complex transitional rules to migrate to a new band plan. We seek comment on the desirability and feasibility of including MDS spectrum in any restructuring auction. Commenters should address the extent to which incumbent MDS licensees are more or less likely than existing ITFS licensees to be willing and able to exchange their licenses and participate in a restructuring auction.

IV. PROCEDURAL MATTERS

A. *Ex Parte* Rules – Permit-But-Disclose

247. This is a permit-but-disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed pursuant to the Commission's rules.⁵⁸⁶

B. Comment Period and Procedures

248. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules,⁵⁸⁷ interested parties may file comments on this Notice on or before **[90 days from publication in the Federal Register]**, and reply comments on or before **[135 days from publication in the Federal Register]**. Comments and reply comments should be filed in WT Docket No. 03-66, and may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.⁵⁸⁸ All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding.

249. Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket number. Parties may also submit an electronic comment by e-mail via the Internet. To obtain filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message: "get form <your e-mail address>." A sample form and directions will be sent in reply.

250. Parties who choose to file by paper must file an original and four copies of each filing. If parties want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. All filings must be sent to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Room TW-A325, Washington, D.C. 20554. Furthermore, parties are requested to provide courtesy copies for the following Commission staff: (1) Nancy Zaczek, Charles Oliver and Stephen Zak, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Room. 3-C124, Washington, D.C. 20554; and (2) Gary Michaels and Andrea Kelly, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Room. 4-A760, Washington, D.C. 20554. One copy of each filing (together with a diskette copy, as indicated below) should also be sent to the Commission's copy contractor, Qualex International, 445 12th Street, SW, Room CY-B402, Washington, DC, 20554, 202-863-2893.

251. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be attached to the original paper filing submitted to the Office of the Secretary. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Microsoft TM Word 97 for Windows or compatible software. The diskette should be accompanied by a

⁵⁸⁶ See generally 47 C.F.R. §§ 1.1202, 1.1203, *1.1206*

⁵⁸⁷ See 47 C.F.R. §§ 1.415, *1.419*

⁵⁸⁸ Electronic Filing of Documents in Rulemaking Proceedings, *Report and Order*, 13 FCC Rcd 11,322 (1998).

cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding, type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy – Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters should send diskette copies to the Commission's copy contractor, Qualex International, 445 12th Street, SW, Room CY-B402, Washington, DC, 20554. 202-863-2893.

252. The public may view the documents tiled in this proceeding during regular business hours in the FCC Reference Information Center, Federal Communications Commission, 445 12th Street, S.W., Room CY-A257, Washington, D. C. 20554, and on the Commission's Internet Home Page: <<http://www.fcc.gov>>. Copies of comments and reply comments are also available through the Commission's duplicating contractor: Qualex International, 445 12th Street, SW, Room CY-B402, Washington, DC, 20554, 202-863-2893. Accessible formats (computer diskettes, large print, audio recording and Braille) are available to persons with disabilities by contacting Brian Millin, of the Consumer & Governmental Affairs Bureau, at (202) 418-7426, TTY (202) 418-7365, or at bmillin@fcc.gov.

C. Initial Regulatory Flexibility Analysis

253. As required by the Regulatory Flexibility Act of 1980 (RFA),⁵⁸⁹ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in the Notice. The analysis is found in Appendix A. We request written public comment on the analysis. Comments must be filed in accordance with the same deadlines as comments tiled in response to the *NPRM & MO&O*, and must have a separate and distinct heading designating them as responses to the IRFA. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *NPRM & MO&O*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

D. Initial Paperwork Reduction Analysis

254. This *NPRM & MO&O* may contain proposed information collections. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this Notice, as required by the Paperwork Reduction Act of 1995.⁵⁹⁰ Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

255. Written comments by the public and agencies on the proposed information collections are due xxx, 2003. Written comments by the OMB on the proposed and/or modified information collections are due on or before www, 2003. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley

⁵⁸⁹ See 5 U.S.C. § 603

⁵⁹⁰ See Pub. E. No. 104-13

Herman, Federal Communications Commission, 445 12th Street, S.W., Room 1-C804, Washington, D.C. 20554, or via the Internet to jboley@fcc.gov, and to Kim A. Johnson, Policy Analyst, Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB), Docket Library, Room 10236, New Executive Office Building (NEOB), 725 17th Street, N.W., Washington, D.C. 20503 or via the Internet at Kim_A_Johnson@omb.eop.gov.

E. Further Information

256. For further information concerning this rulemaking proceeding, contact Nancy Zaczek or Charles Oliver at (202) 418-0680, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Room. 4-C367, Washington, D.C. 20554; or via the Internet to nzaczek@fcc.gov or coliver@fcc.gov.

V. ORDERING CLAUSES

257. Accordingly, IT **IS ORDERED**, pursuant to sections 1, 2, 4(i), 7, 10, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333 and 706 of the Communications Act of 1934, 47 U.S.C. §§ 151, 152, 154(i), 157, 160, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333, and 706, that this *Notice of Proposed Rulemaking and Memorandum Opinion and Order* is hereby ADOPTED.

258. IT **IS FURTHER ORDERED** that the five-year build-out requirements in section 21.930 of our rules, 47 C.F.R. § 21.930, **IS SUSPENDED** until further notice.

259. IT **IS FURTHER ORDERED** the build-out requirements for site-based ITFS and MDS licensees and permittees that have not expired as of the release date of this *Memorandum Opinion and Order ARE SUSPENDED* until further notice.


260. IT **IS FURTHER ORDERED** that applications for new MDS or ITFS licenses, major modifications of MDS stations, or major changes to ITFS stations other than applications for license assignments or transfers of control **WILL NOT BE ACCEPTED** until further notice.

261. With regard to mutually exclusive ITFS applications, IT **IS FURTHER ORDERED** that applications for acceptance of settlement agreements filed after the release date of this *Notice of Proposed Rulemaking and Memorandum Opinion and Order WILL NOT BE ACCEPTED*.

262. IT **IS FURTHER ORDERED** that NOTICE **IS HEREBY GIVEN** of the proposed regulatory changes described in this *NPRM & MO&O*, and that comment is sought on these proposals.

263. IT **IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *NPRM & MO&O*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION


Marlene H. Dortch *w7c*
Secretary

APPENDIX A
INITIAL REGULATORY FLEXIBILITY ANALYSIS

(For Notice of Proposed Rulemaking)

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),⁵⁹¹ the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Notice of Proposed Rule Making and Memorandum Opinion and Order (NPRM & MO&O)*. Written public comments are requested on this IRFA. Comments **must** be identified as responses to the IRFA and must be filed by the deadlines specified in the *NPRM & MO&O* for comments. The Commission will send a copy of this *NPRM & MO&O*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).⁵⁹² In addition, the *NPRM & MO&O* and IRFA (or summaries thereof) will be published in the Federal Register.⁵⁹³

Need for, and Objectives of, the Proposed Rules

2. In this *NPRM* we propose a number of changes and ask for comments concerning the rules governing the 2500-2690 MHz band, for the Multipoint Distribution Service (MDS), the Multichannel Multipoint Distribution Service (MMDS), and the Instructional Television Fixed Service (ITFS). Our proposals include:

- Proposing technical rules to increase licensee flexibility;
- **Seeking** comment on revising the band plan;
- Proposing service rules for mobile operation;
- Proposing to encourage entrepreneurial efforts to develop new technologies and services by opening ITFS spectrum to a wide range of applicants;
- Proposing to simplify and streamline the licensing process;
- Proposing application filing and processing to facilitate electronic filing in **ULS**;
- Proposing to consolidate these services under Part 101;
- Tentatively concluding that MDS and ITFS licensees should receive a six-month transition period after application processing in ULS begins before requiring mandatory electronic filing in ULS;
- Suspending the acceptance and processing of applications **in** this band, with certain

⁵⁹¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, (SBREFA) Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

⁵⁹² See 5 U.S.C. 9: 603(a).

⁵⁹³ See 5 U.S.C. § 603(a).

exceptions, until the completion of this rulemaking proceeding;

- Suspending the current August 16, 2003 construction deadline for BTA authorization holders; and
- Proposing to assign **ITFS** licenses through competitive bidding

3. We believe our proposals will encourage the enhancement of existing services using this band and the development of new innovative services to the public such as providing wireless broadband services, including high-speed Internet access and mobile services. We also believe that our proposals will allow licensees to adapt quickly to changing market conditions and the marketplace, rather than the government, to determine how this band will best be used.

Legal Basis

4. The proposed action is authorized under Sections 1, 2, 4(i), 7, 10, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333 and 706 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 157, 160, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333, and 706.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

5. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules.⁵⁹⁴ The RFA generally defines the term “small entity” as having the same meaning as the terms, “small business,” “small organization,” and “small governmental jurisdiction.”⁵⁹⁵ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁵⁹⁶ A small business concern is one which (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁵⁹⁷ A small organization is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”⁵⁹⁸ Nationwide, as of 1992, there were approximately 275,801 small organizations.⁵⁹⁹ The definition of

⁵⁹⁴ 5 U.S.C. § 603(b)(3).

⁵⁹⁵ 5 U.S.C. § 601(6).

⁵⁹⁶ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

⁵⁹⁶ 15 U.S.C. § 632.

⁵⁹⁷ 15 U.S.C. § 632.

⁵⁹⁸ 5 U.S.C. § 601(4)

⁵⁹⁹ 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

"small governmental jurisdiction" is one with a population of fewer than 50,000.⁶⁰⁰ There are 85,006 governmental jurisdictions in the nation.⁶⁰¹ This number includes such entities as states, counties, cities, utility districts and school districts. There are no figures available on how many of these entities have populations of fewer than 50,000. However, this number includes 38,978 counties, cities and towns, and of those, 37,556, or 96 percent, have populations of fewer than 50,000.⁶⁰² The Census Bureau estimates that this ratio is approximately accurate for all government entities. Thus, of the 85,006 governmental entities, we estimate that 96 percent, or about 81,600, are small entities that may be affected by our rules

6. Nationwide, there are 4.44 million small business **firms**, according to SBA reporting data.⁶⁰³ In this section, we further describe and estimate the number of small entity licensees and regulatees that may be affected by rules adopted pursuant to this NPRM. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its *Trends in Telephone Service* report.⁶⁰⁴ The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers,⁶⁰⁵ Paging,⁶⁰⁶ and Cellular and Other Wireless Telecommunications.⁶⁰⁷ Under these categories, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and others, we discuss the total estimated numbers of small businesses that might be affected by our actions.

7. **Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and ITFS.** Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS).⁶⁰⁸ In connection with the 1996 MDS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.⁶⁰⁹ The MDS

⁶⁰⁰ 5 U.S.C. § 601(5)

⁶⁰¹ 1992 Census of Governments, U.S. Bureau of the Census, U.S. Department of Commerce.

⁶⁰² *Id.*

⁶⁰³ See 1992 Economic Census, U.S. Bureau of the Census. Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

⁶⁰⁴ FCC. Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, Table 5.3 (May 2002) (*Trends in Telephone Service*).

⁶⁰⁵ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513310 (changed to 517110 in October 2002).

⁶⁰⁶ 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in October 2002)

⁶⁰⁷ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

⁶⁰⁸ Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, MM Docket No. 94-131 and PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589, 9593 ¶ 7 (1995) (*MDS Auction R&O*).

⁶⁰⁹ 47 C.F.R. § 21.961(b)(1)

auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in annual receipts.” According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.⁶¹⁰ Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more but less than \$25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard also appears applicable to ITFS. There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.⁶¹² Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

8. In connection with the 1996 MDS auction, the Commission defined “small business” as an entity that, together with its affiliates, has average gross annual revenues that are not more than \$40 million for the preceding three calendar years.⁶¹³ The Commission established this small business definition in the context of this particular service and with the approval of SBA.⁶¹⁴ The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs).⁶¹⁵ Of the 67 auction winners, 61 met the definition of a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that are considered small entities.⁶¹⁶ After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 MDS licensees that are defined as small businesses under either the SBA or the Commission’s rules. Some of those 440 small business licensees may be affected by the proposals in this NPRM & MO&O.

⁶¹⁰ 13 C.F.R. § 121.201, NAICS code 513220 (changed to 517510 in October 2002).

⁶¹¹ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization)”, Table 4, NAICS code 513220 (issued October 2000).

⁶¹² In addition, the term “small entity” within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

⁶¹³ 47 C.F.R. § 21.961(b)(1).

⁶¹⁴ See *MDS Auction R&O*, 10 FCC Rcd 9589.

⁶¹⁵ Basic Trading Areas (BTAs) were designed by Rand McNally and are the geographic areas by which MDS was auctioned and authorized. See *Id.* at 9608.

⁶¹⁶ 47 U.S.C. § 309(j). (Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA’s small business size standard for “other telecommunications” (annual receipts of \$11 million or less)). See 13 C.F.R. 121.201, NAICS code 513220.

9. MDS is also heavily encumbered with licensees of stations authorized prior to the auction. The SBA has developed a definition of small entities for pay television services that includes all such companies generating \$11 million or less in annual receipts.⁶¹⁷ This definition includes multipoint distribution systems, and thus applies to MDS licensees and wireless cable operators that did not participate in the MDS auction. Information available to us indicates that there are [832] of these licensees and operators that do not generate revenue in excess of \$11 million annually. Therefore, for purposes of this IRFA, we find there are approximately [892] **small** MDS providers as defined by the SBA and the Commission's auction rules, and some of these providers may take advantage of our amended rules to provide two-way MDS.

10. There are presently [2032] ITFS licensees. All but [100] of these licenses are held by educational institutions (these [100] fall in the MDS category, above). Educational institutions may be included in the definition of a small entity.⁶¹⁸ ITFS is a non-profit non-broadcast service that, depending on SBA categorization, has, as small entities, entities generating either \$10.5 million or less, or \$11.0 million or less, in annual receipts.⁶¹⁹ However, we do not collect, nor are we aware of other collections of, annual revenue data for ITFS licensees. Thus, we find that up to [1932] of these educational institutions are small entities that may take advantage of our amended rules to provide additional flexibility to ITFS.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements.

11. As noted previously,⁶²⁰ applicants for MDS or ITFS licenses would be required to apply through the Universal Licensing System using FCC Form 601,⁶²¹ and other appropriate forms.⁶²² Licensees will also be required to apply for an individual station license by filing FCC Form 601 for those individual stations that (1) require submission of an Environmental Assessment of the facilities under Section 1.1307 of our Rules;⁶²³ (2) require international coordination of the application;⁶²⁴ or (3) require coordination with the Frequency Assignment Subcommittee (FAS) of the Interdepartment Radio Advisory Committee (IRAC). While these requirements are new with respect to potential licensees in the ITFS and MDS bands, the Commission has applied these requirements to licensees in other bands. Moreover, the Commission is also proposing to eliminate many burdensome tiling requirements that have previously been applied to MDS and ITFS.

“Steps Taken to Minimize Significant Economic Impact on Small Entities, and

⁶¹⁷ 13 C.F.R. § 121.201.

⁶¹⁸ See 5 U.S.C. §§ 601 (3)-(5).

⁶¹⁹ See 13 C.F.R. § 121.210(SIC 4833,4841, and 4899).

⁶²⁰ See para 159 *supra*.

⁶²¹ 47 C.F.R. § 1.913(a)(1).

⁶²² 47 C.F.R. § 1.2107.

⁶²³ 47 C.F.R. § 1.1307.

⁶²⁴ See *e.g.*, 47 C.F.R. § 1.928 (regarding frequency coordination arrangements between the U.S. and Canada)

⁶²⁵ See paras. 161-170 and 173-182, *supra*.

Significant Alternatives Considered.

12. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for such small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small

13. In this *NPRM & MO&O*, we seek comment on a number of proposals and alternatives regarding the use of the 2500-2690 MHz band. This *NPRM & MO&O* seeks to adopt rules that will reduce regulatory burdens, promote innovative services and encourage flexible use of this spectrum. It opens up economic opportunities to a variety of spectrum users, including small businesses. We consider various proposals and alternatives partly because we seek to minimize, to the extent possible, the economic impact on small businesses.

14. We have reduced the burdens wherever possible. To minimize any further negative impact, however, we propose certain exclusive incentives for small entities that will redound to their benefit. We propose the use of bidding credits for small entities that participate in auctions of licenses that are conducted pursuant to the rules proposed in this *NPRM & MO&O*. We propose to define a “small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$40 million, a “very small business” as an entity with average gross revenues for the preceding three years not exceeding \$15 million, and an “entrepreneur” as an entity with average annual gross revenues for the preceding three years not exceeding \$3 million.⁶²⁷ We propose that entities qualifying as small businesses will receive a 15% bidding credit, that entities qualifying as very small businesses will receive a 25% bidding credit, and that entities qualifying as entrepreneurs will receive a 35% bidding credit. Qualifying small businesses, very small businesses, and entrepreneurs can reduce their winning bids by the amount of their bidding credits. We believe that these bidding credits will help small entities compete in our auctions and acquire licenses. We seek comment on our proposed small business definitions and bidding credits, including information on factors that may affect the capital requirements of the type of services a licensee may seek to provide.

15. The regulatory burdens contained in the *NPRM & MO&O*, such as filing applications on appropriate forms, are necessary in order to ensure that the public receives the benefits of innovative new services, or enhanced existing services, in a prompt and efficient manner. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities. We seek comment on significant alternatives commenters believe we should adopt.

Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule

16. None.

⁶²⁶ See 5 U.S.C. § 603(c)

⁶²⁷ See *supra* para. 234.

APPENDIX B

PROPOSED RULES

1. For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Parts 1, 21, 73, 74, and 101 as follows:

2. Part 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

PART 1 –PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read:

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303®, 309 and 325(e).

2. Section 1.933(c) is amended to add subparagraphs (8) and (9) as follows:

* * * * *

(8) Multipoint Distribution Service.

(9) Instructional Television Fixed Service

3. Section 1.1102 is amended by amending paragraph 20 to read as follows:

20. Multipoint Distribution Service (including Multi-channel MDS)

- | | |
|---|---|
| a. New Station 601 & 159 220.00 CJM | Federal Communications Commission,
Wireless Bureau Applications,
P.O. Box 358155,
Pittsburgh, PA 15251-5155. |
| b. Major Modification of
License 601 & 159 220.00 CJM | Federal Communications Commission,
Wireless Bureau Applications,
P.O. Box 358994,
Pittsburgh, PA 15251-5155. |
| c. Certification of Completion of
Construction 601 & 159 80.00 CJM | Federal Communications Commission,
Wireless Bureau Applications,
P.O. Box 358155,
Pittsburgh, PA 15251-5155. |
| d. License Renewal 601 & 159 220.00 CJM | Federal Communications Commission,
Wireless Bureau Applications,
P.O. Box 358155,
Pittsburgh, PA 15251-5155. |
| e. Assignment or Transfer: | |

(b) First Station on Application 603 & 159
80.00 CCM

Federal Communications Commission,
Wireless Bureau Applications,
P.O. Box 358155,
Pittsburgh, PA 15251-5155.

(ii) Each Additional

Station 603 & 159 50.00 CAM

Federal Communications Commission,
Wireless Bureau Applications,
P.O. Box 358155,
Pittsburgh, PA 15251-5155.

f. Extension of
Construction

Authorization601 & 159 185.00 CHM

Federal Communications Commission,
Wireless Bureau Applications,
P.O. Box 358155,
Pittsburgh, PA 15251-5155.

g. Special Temporary
Authority or Request
for Waiver of Prior
Construction

AuthorizationCorres & 159 100.00 CEM

Federal Communications Commission,
Wireless Bureau Applications,
P.O. Box 358155,
Pittsburgh, PA 15251-5155.

(b) * * * *

Under the authority 47 U.S.C. § 154, amend 47 C.F.R. chapter I by removing Part 21

3. Part 74 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

**PART 74 – EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCASTING
AND OTHER PROGRAM DISTRIBUTIONAL SERVICES**

1. The authority citation for Part 74 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, 307, 336(f), 336(h) and 554.

(b) Section 74.1 is revised to read as follows:

b) Rules in Part 74 which apply exclusively to a particular service are contained in that service subpart, as follows: Experimental Broadcast Stations, Subpart A; Remote Pickup Broadcast Stations, Subpart D; Aural Broadcast STL and Intercity Relay Stations, Subpart E; TV Auxiliary Broadcast Stations, Subpart F; Low Power TV, TV Translator and TV Booster Stations,

Subpart G; Low Power Auxiliary Stations, Subpart H FM Broadcast Translator Stations and FM Broadcast Booster Stations, Subpart L.

3. Subpart I is reserved.

4. Part 101 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 101 continues to read as follows:

AUTHORITY: 47 USC. 154 and 303, unless otherwise noted.

2. Section 101.3 is amended to add the following definitions:

* * * *

Instructional Television Fixed Service. A fixed or mobile service intended primarily for video, data, or voice transmissions of instructional, cultural, and other types of educational material to one or more receiving locations.

(b) * * *

Multipoint Distribution Service. A domestic public radio service rendered on microwave frequencies from one or more stations transmitting to multiple receiving facilities.

(b) Section 101.101 of the Commission's Rules is amended to read as follows:

Frequency band (MHz)	Radio service				Notes
	Common carrier (Part 101)	Private radio (Part 101)	Broadcast auxiliary (Part 74)	Other (Parts 15, 22, 24 25, 74, 78, and 100)	
* * * *					
2450-2500	LTTS	OFS	TV BAS	ISM	F/M/TF
2500-2650	ITFS MDS	ITFS MDS			
2650-2690	ITFS MDS	OFS MDS/ITFS			

(b) * * *

BAS: Broadcast Auxiliary Service—(Part 74)

CARS: Cable Television Relay Service—(Part 78)

CC: Common Carrier Fixed Point-to-Point Microwave Service—(Part 101, Subparts C & I)

DBS: Direct Broadcast Satellite—(Part 100)

DEMS: Digital Electronic Message Service—(Part 101, Subpart G)

ISM: Industrial, Scientific & Medical—(Part 18)

ITFS: Instructional Television Fixed Service—(Part 101, Subpart P)

LTTS: Local Television Transmission Service—(Part 101, Subpart J)

MAS: Multiple Address System--(Part 101)
MDS: Multipoint Distribution Service--(Part 101, Subpart Q)
OFS: Private Operational Fixed Point-to-Point Microwave Service--(Part 101 Subparts C & H)
PCS: Personal Communications Service--(Part 24)
PET: Emerging Technologies (per ET Dkt. No. 92-9, not yet assigned)
PRS: Paging and Radiotelephone Service--
(Pan 22, Subpart E)
SAT: Fixed Satellite Service--(Part 25)

4. Part 101 is amended to add a new Subpart P, as follows:

Subpart P: Instructional Television Fixed Service

101.1401 Purpose and Permissible Service:

(a)(1) Instructional television fixed stations are intended primarily through video, data, or voice transmissions to further the educational mission of accredited public and private schools, colleges and universities providing a formal educational and cultural development to enrolled students. Authorized instructional television fixed station channels must be used to further the educational mission of accredited schools offering formal educational courses to enrolled students.

(2) In furtherance of the educational mission of accredited schools, instructional television fixed station channels may be used for:

(b) In-service training and instruction in special skills and safety programs, extension of professional training, informing persons and groups engaged in professional and technical activities of current developments in their particular fields, and other similar endeavors.

(ii) Transmission of material directly related to the administrative activities of the licensee, such as the holding of conferences with personnel, distribution of reports and assignments, exchange of data and statistics, and other similar uses.

(iii) Response channels transmitting information associated with formal educational courses offered to enrolled students, including uses described in paragraphs (a)(2)(i) and (ii) of this section, from ITFS response stations to response station hubs

(b) Stations may be licensed in this service as originating or relay stations to interconnect instructional television fixed stations in adjacent areas, to deliver instructional and cultural material to, and obtain such material from, commercial and noncommercial educational television broadcast stations for use on the instructional television fixed system, and to deliver instructional and cultural material to, and obtain such material from, nearby terminals or connection points of closed circuit educational television systems employing wired distribution systems or radio facilities authorized under other parts of this Chapter, or to deliver instructional and cultural material to any CATV system serving a receiving site or sites which would be eligible for direct reception of ITFS signals under the provisions of paragraph (a) of this section.

(3) When an ITFS licensee makes capacity available on a common carrier basis, it will be subject to common carrier regulation.

(1) A licensee operating as a common carrier is required to comply with all policies and rules applicable to that service. Responsibility for making the initial determination of whether a particular activity is common carriage rests with the **ITFS** licensee.

(2) An ITFS licensee **also** may alternate, without further authorization required, between rendering service on a common carrier and non-common carrier basis, provided that the licensee notifies the Commission of any service status changes at least 30 days in advance of such changes. The notification shall state whether there is any affiliation or relationship to any intended or likely subscriber

or program originator

101.1402 BTA license authorization.

(a) Winning bidders must file an application (FCC Form 601) for an initial authorization in each market and frequency block.

(b) Blanket licenses are granted for each market and frequency block. Blanket licenses cover all mobile and response stations. Blanket licenses also cover all fixed stations anywhere within the authorized service area, except as follows:

(1) A fixed station (other than a response station) would be required to be individually licensed if

- (i) International agreements require coordination;
- (ii) Submission of an Environmental Assessment is required under § 1.1307 of this chapter;
- (iii) The station would affect the radio quiet zones under § 1.924 of this chapter.

(2) Any antenna structure that requires notification to the Federal Aviation Administration (FAA) must be registered with the Commission prior to construction under § 17.4 of this chapter.

101.1403 Service areas.

ITFS service areas are Basic Trading Areas (BTAs). BTAs are based on the Rand McNally 1992 *Commercial Atlas & Marketing Guide*, 123rd Edition, at pages 38-39, with the following additions licensed separately as BTA-like areas: American Samoa; **Guam**; Northern Mariana Islands; Mayaguez/Aguadilla-Ponce, Puerto Rico; San Juan, Puerto Rico; and the United States Virgin Islands. The ~~Disaggre~~/Aguadilla-Ponce BTA-like service area consists of the following municipios: Adjuntas, Aguada, Aguadilla, Anasco, Arroyo, **Cabo Rojo**, Coamo, Guanica, Guayama, Guayanilla, Hormigueros, Isabela, Jayuya, Juana Diaz, Lajas, Las Marias, ~~Disaggre~~, Maricao, Maunabo, Moca, Patillas, Penuelas, Ponce, Quebradillas, ~~Disaggre~~, Sabana Grande, Salinas, San German, Santa Isabel, Villalba and Yauco. The San Juan BTA-like service area consists of all other municipios in Puerto Rico.

101.1404 Conversion of incumbent ITFS stations to geographic area licensing.

(a) Any **ITFS** station licensed by the Commission prior to [date to be decided] as well as assignments and transfers approved by the Commission and consummated as of [date to be decided] shall be considered incumbent and grandfathered (may continue to operate under their licensed parameters).

(b) As of [date to be decided], all incumbent ITFS licenses shall be converted to a blanket license. Pursuant to that geographic area license, such incumbent licensees may modify their systems provided the signal level [specific level to be decided] does not increase outside their pre-existing protected service area. The blanket license covers all fixed stations anywhere within the authorized service area, except as follows:

(1) A fixed station (other than a response station) would be required to be individually licensed if

- (i) International agreements require coordination;
- (ii) Submission of an Environmental Assessment is required under § 1.1307 of this chapter;
- (iii) The station would affect the radio quiet zones under § 1.924 of this chapter.

(2) Any antenna structure that requires notification to the Federal Aviation Administration (FAA) must be registered with the Commission prior to construction under § 17.4 of this chapter.

Incumbent operators and geographic area licensees may negotiate alternative criteria.

(c) The frequencies associated with incumbent authorizations that have been cancelled automatically or otherwise been recovered by the Commission will automatically revert to the applicable BTA licensee.

101.1405 Performance Requirements

(a) Incumbent site-based licensees are subject to the construction requirements set forth in § 101.63.

(b) All ITFS BTA licensees must demonstrate substantial service at the time of license renewal. A licensee's substantial service showing should include, but not be limited to, the following information for each channel for which it holds a license, in each BTA or portion of a BTA covered by their license, in order to qualify for renewal of that license. The information provided will be judged by the Commission to determine whether the licensee is providing service which rises to the level of "substantial."

(1) A description of the ITFS licensee's current service in terms of geographic coverage;

(2) Copies of all orders or other adjudications that the licensee has violated the Communications Act or the Commission's Rules or policies;

(3) A description of the ITFS band licensee's current service in terms of population served, as well as any additional service provided during the license term;

(4) A description of the ITFS licensee's investments in its system(s) (type of facilities constructed and their operational status is required);

(b) Any ITFS licensees adjudged not to be providing substantial service will not have their licenses renewed.

101.1406 Partitioning and Disaggregation

a) Eligibility.

(1) Parties seeking approval for partitioning and disaggregation shall request from the Commission an authorization for partial assignment of license. Geographic area licensees may participate in aggregation, disaggregation, and partitioning within the bands licensed on a geographic area basis.

(2) Eligible ITFS licensees may apply to the Commission to partition their licensed geographic service areas to eligible entities and are free to determine the portion of their service areas to be partitioned. Eligible ITFS licensees may aggregate or disaggregate their licensed spectrum at any time following the grant of a license.

(b) Technical standards—

(b) There is no limitation on the amount of spectrum that an ITFS licensee may aggregate.

(2) Spectrum may be disaggregated in any amount. A licensee need not retain a minimum amount of spectrum.

(3) In the case of partitioning, applicants and licensees must file FCC Form 603 pursuant to § 1.948 of this chapter and list the partitioned service area on a schedule to the application. The geographic coordinates must be specified in degrees, minutes, and seconds to the nearest second of latitude and longitude, and must be based upon the 1983 North American Datum (NAD83).

(4) Combined partitioning and disaggregation. The Commission will consider requests from geographic area licensees for partial assignment of licenses that propose combinations of partitioning and disaggregation.

(c) Construction requirements.

(1) Disaggregation. Partial assignors and assignees for license disaggregation have two options to meet construction requirements. Under the first option, the disaggregator and Disaggregate would certify that they each will share responsibility for meeting the applicable construction requirements set forth in § 101.1406 for the geographic service area. If parties choose this option and either party fails to demonstrate substantial service, both licenses would be subject to forfeiture at renewal. The second option allows the parties to agree that either the disaggregator or (disaggregate would be responsible for meeting the requirements in § 101.1405 for the geographic service area. If

parties choose this option, and the party responsible for meeting the construction requirement fails to do so, only the license of the non-performing party would be subject to forfeiture at renewal.

(2) Partitioning. Partial assignors and assignees for license partitioning have two options to meet construction requirements. Under the first option, the partitionor and partitionee would each certify that they will independently provide substantial service for their respective partitioned areas. If either licensee fails to meet its requirement in § 101.1405, only the non-performing licensee's renewal application would be subject to dismissal. Under the second option, the partitionor certifies that it has met or will meet the requirement in § 101.1405 for the entire market. If the partitionor fails to meet the requirement in § 101.1405, however, only its license would be subject to forfeiture at renewal.

(3) All applications requesting partial assignments of license for partitioning or disaggregation must certify in the appropriate portion of the application which construction option is selected.

(4) Responsible parties must submit supporting documents as required by § 101.1405.

(d) License term. The license term for a partitioned license area and for disaggregated spectrum shall be the remainder of the original licensee's license term.

(b) Remote Control Operation.

Licensed ITFS stations may be operated by remote control without further authority.

101.1408 Unattended Operation

Unattended operation of licensed ITFS stations is permitted without further authority. An unattended relay station may be employed to receive and retransmit signals of another station provided that the transmitter is equipped with circuits which permit it to radiate only when the signal intended to be retransmitted is present at the receiver input terminals.

101.1409 License Term

(a) Incumbent ITFS licenses shall be issued for a period of 10 years beginning with the date of grant.

(b) A BTA authorization shall be issued for a period of ten years from the date the Commission declared bidding closed in the ITFS auction.

(b) Part 101 is amended to add a new Subpart Q. as follows:

Subpart Q: Multipoint Distribution Service:

101.1501 Purpose and Permissible Service:

Multipoint Distribution Service stations may provide any fixed or mobile services for which its frequency bands are allocated, subject to the technical and other rules contained in this part and subpart.

101.1502 BTA license authorization.

(a) Winning bidders must file an application (FCC Form 601) for an initial authorization in each market and frequency block.

(b) Blanket licenses are granted for each market and frequency block. Blanket licenses cover all mobile and response stations, Blanket licenses also cover all fixed stations anywhere within the

authorized service area, except as follows:

(1) A fixed station (other than a response station) would be required to be individually licensed if

- (i) International agreements require coordination;
- (ii) Submission of an Environmental Assessment is required under § 1.1307 of this chapter;
- (iii) The station would affect the radio quiet zones under § 1.924 of this chapter.

(2) Any antenna structure that requires notification to the Federal Aviation Administration (FAA) must be registered with the Commission prior to construction under § 174 of this chapter.

101.1503 Service areas.

MDS service areas are Basic Trading Areas (BTAs). BTAs are based on the Rand McNally *1992 Commercial Atlas & Marketing Guide*, 123rd Edition, at pages 38-39, with the following additions licensed separately as BTA-like areas: American Samoa; Guam; Northern Mariana Islands; Mayaguez/Aguadilla-Ponce, Puerto Rico; San Juan, Puerto Rico; and the United States Virgin Islands. The ☐isaggre/Aguadilla-Ponce BTA-like service area consists of the following municipios: Adjuntas, Aguada, Aguadilla, Anasco, Arroyo, **Cabo Rojo**, Coamo, Guanica, Guayama, Guayanilla, Hormigueros, Isabela, Jayuya, Juana Diaz, Lajas, Las Marias, ☐isaggre, Maricao, Maunabo, Moca, Patillas, Penuelas, Ponce, Quebradillas, ☐isagg, Sabana Grande, Salinas, San German, Santa Isabel, Villalba and Yauco. The San Juan BTA-like service area consists of all other municipios in Puerto Rico.

101.1504 Conversion of incumbent **MDS** stations to geographic area licensing

(a) Any **MDS** station licensed by the Commission prior to [date to be decided] as well as assignments and transfers approved by the Commission and consummated as of [date to be decided] shall be considered incumbent and grandfathered (may continue to operate under their licensed parameters).

(b) As of [date to be decided], all incumbent MDS licenses shall be converted to a blanket license. Pursuant to that geographic area license, such incumbent licensees may modify their systems provided the signal level [specific level to be decided] does not increase outside their pre-existing protected service area. The blanket license covers all fixed stations anywhere within the authorized service area, except as follows:

(1) A fixed station (other than a response station) would be required to be individually licensed if:

- (i) International agreements require coordination;
- (ii) Submission of an Environmental Assessment is required under § 1.1307 of this chapter;
- (iii) The station would affect the radio quiet zones under § 1.924 of this chapter.

(2) Any antenna structure that requires notification to the Federal Aviation Administration (FAA) must be registered with the Commission prior to construction under § 17.4 of this chapter.

® The frequencies associated with incumbent authorizations that have been cancelled automatically or otherwise been recovered by the Commission will automatically revert to the applicable BTA licensee.

101.1505 Performance Requirements

(a) Incumbent site-based licensees are subject to the construction requirements set forth in § 101.63.

(b) All MDS BTA licensees must demonstrate substantial service at the time of license renewal. A licensee's substantial service showing should include, but not be limited to, the following information for each channel for which it holds a license, in each BTA or portion of a BTA covered by their license, in order to qualify for renewal of that license. The information provided will be judged by

the Commission to determine whether the licensee is providing service which rises to the level of "substantial."

- (1) A description of the MDS licensee's current service in terms of geographic coverage;
- (2) Copies of all orders or other adjudications that the licensee has violated the Communications Act or the Commission's Rules or policies;
- (3) A description of the MDS licensee's current service in terms of population served, as well as any additional service provided during the license term;
- (4) A description of the MDS licensee's investments in its system(s) (type of facilities constructed and their operational status is required);
- (b) Any MDS licensees adjudged not to be providing substantial service will not have their licenses renewed.

101.1506 Partitioning and Disaggregation

a) Eligibility.

(1) Parties seeking approval for partitioning and disaggregation shall request from the Commission an authorization for partial assignment of license. Geographic area licensees may participate in aggregation, disaggregation, and partitioning within the bands licensed on a geographic area basis.

(2) Eligible MDS licensees may apply to the Commission to partition their licensed geographic service areas to eligible entities and are free to determine the portion of their service areas to be partitioned. Eligible MDS licensees may aggregate or disaggregate their licensed spectrum at any time following the grant of a license.

(b) Technical standards—

(b) There is no limitation on the amount of spectrum that an MDS licensee may aggregate.

(2) Spectrum may be disaggregated in any amount. A licensee need not retain a minimum amount of spectrum.

(3) In the case of partitioning, applicants and licensees must file FCC Form 603 pursuant to § 1.948 of this chapter and list the partitioned service area on a schedule to the application. The geographic coordinates must be specified in degrees, minutes, and seconds to the nearest second of latitude and longitude, and must be based upon the 1983 North American Datum (NAD83).

(4) Combined partitioning and disaggregation. The Commission will consider requests from geographic area licensees for partial assignment of licenses that propose combinations of partitioning and disaggregation.

Ⓢ Construction requirements.

(1) Disaggregation. Partial assignors and assignees for license disaggregation have two options to meet construction requirements. Under the first option, the disaggregator and ☐disaggregate would certify that they each will share responsibility for meeting the applicable construction requirements set forth in § 101.1505 for the geographic service area. If parties choose this option and either party fails to demonstrate substantial service, both licenses would be subject to forfeiture at renewal. The second option allows the parties to agree that either the disaggregator or ☐disaggregate would be responsible for meeting the requirements in § 101.1505 for the geographic service area. If parties choose this option, and the party responsible for meeting the construction requirement fails to do so, only the license of the non-performing party would be subject to forfeiture at renewal.

(2) Partitioning. Partial assignors and assignees for license partitioning have two options to meet construction requirements. Under the first option, the partitionor and partitionee would each certify that they will independently provide substantial service for their respective partitioned areas. If either licensee fails to meet its requirement in § 101.1505, only the non-performing licensee's renewal application would be subject to dismissal. Under the second option, the partitionor certifies that it has met or will meet the requirement in § 101.1505 for the entire market. If the partitionor fails to meet the requirement in § 101.1505, however, only its license would be subject to forfeiture at renewal.

(3) **All** applications requesting partial assignments of license for partitioning or disaggregation must certify in the appropriate portion **of** the application which construction option is selected.

(4) **Responsible parties** must submit supporting documents as required by § 101.1405.

(d) License term. The license term for a partitioned license area and for disaggregated spectrum shall be the remainder of the original licensee's license term.

(b) Remote Control Operation

MDS stations may be operated by remote control without further authority

101.1508 Unattended Operation

Unattended operation of licensed MDS stations is permitted without further authority. **An** unattended relay station may be employed to receive and retransmit signals **of** another station provided that the transmitter is equipped with circuits which permit it to radiate only when the signal intended to be retransmitted is present at the receiver input terminals.

101.1509 License Term

(a) Incumbent **MDS** licenses shall be issued **for** a period of 10 years beginning with the date of grant.

(b) **A BTA** authorization shall be issued for **a** period of ten years from the date the Commission declared bidding closed in the **MDS** auction.

APPENDIX C

THE COALITION PLAN

1. The Coalition proposes to split the 2500-2690 MHz band into three segments, with the middle segment being reserved for high-powered MDS and ITFS stations and the two segments above and below it reserved for low-powered operations. Transition to the new band plan would proceed on a market-by-market basis at the instigation of parties (“Proponents”) offering to pay the conversion costs of all affected ITFS operators. No deadlines would apply unless and until a Proponent offered to fund a market’s transition. Instead, the Coalition provides a detailed description of nine safe proposals; if a Proponent offers any of the nine compensation schemes, the incumbent would be required to accept it. The Coalition proposes that every MDS and ITFS licensee be assigned a geographic service area. Existing circular protected service areas would be converted to geographic service areas with signal strength limits applied at their boundaries.

Coalition Band Plan

2. ITFS and all but two of the MDS channels are located in the 2500 – 2690 MHz band. The Coalition has requested the adoption of a new plan for this band, which consists of multiple interleaved 6-MHz channels. According to the Coalition, the intermixing of the two types of system designs (high-power/high site and low-power cellular systems) causes interference problems because the two system designs are fundamentally **incompatible**.⁶²⁸ To eliminate this interference problem, the Coalition proposes that we establish a new band plan that isolates high-power, high-site systems from two-way cellular systems by separating the two different uses into different segments within the band.” The Coalition notes that the plan allows entities to obtain contiguous spectrum and best provides for two promising technologies – Frequency Division Duplex (FDD) and Time Division Duplex (TDD) technologies.

3. The Coalition proposes to divide the band into three major band segments consisting of the Lower Band Segment (LBS), the Middle Band Segment (MBS) and the Upper Band Segment (UBS) and three minor segments consisting of the I, J and K bands. The LBS would have twelve 5.5-megahertz wide channels extending from 2500 – 2566 MHz, the MBS would have seven 6-megahertz wide channels extending from 2572 – 2614 MHz⁶³⁰ and the UBS would have twelve 5.5-megahertz wide channels extending from 2620 – 2686 MHz. The Coalition proposes to permit low-power operations in the LBS

⁶²⁸ Coalition Proposal at 14. The Coalition states that “high-power, high-site one-way operations tend to cause two types of problems. First, high-power, high-site one-way operations tend to cause interference to co-channel cellular system base stations that are located quite far away. This is because those base stations feature relatively sensitive reception antennas (to ‘hear’ signals from low-power subscriber equipment) and those base station antennas generally are located above the ground clutter (and thus more likely to have an uninterrupted transmission path from the co-channel high-power, high-site station in a neighboring market). Thus, these base stations are by their nature sensitive to co-channel interference. Second, transmissions from portable, nomadic and mobile subscriber equipment in cellular networks pose the potential to cause brute force overload of close-by equipment used to receive high-power, high-site services.” See Coalition Proposal at 10.

⁶²⁹ While comments filed in response to our public notice support the Coalition plan, including transition, in general, several commenters disagreed with parts of the Coalition plan. See e.g., MMDS Licensee Coalition comments and Alliance of Independent Wireless Video Operators comments.

⁶³⁰ The Coalition states that it considered the possibility of reducing the size of the MBS allocation on a market-by-market basis. It concluded, however, that the benefits of a fixed 42 megahertz wide MBS far outweigh any possible benefits from a market-by-market approach. See Coalition Proposal at 17.

Lower Band (LBS)	Band	Middle Band (MBS)	Band	Upper Band (UBS)	Band
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⁶³¹ Coalition Proposal at 12.

⁶³² It could be used for downstream transmissions in a FDD system so long as the licensee meets the MBS technical and operational rules. Also, with the consent of impacted licensees, it could be used for upstream communications. **See** Coalition Proposal at 17 and Appendix B at 3.

⁶³³ Coalition Proposal, Appendix B at 2.

⁶³⁴ Under the Coalition plan, each licensee contributes spectrum to the Transition Bands (500 kHz for every channel in the LBS or UBS). **See** Coalition Proposal at 16, n.43. Also, the Coalition notes that it has not agreed as of yet on a system of licensing and technical rules for the Transition Bands. **See** Coalition Proposal at 19, n.47.

⁶³⁵ Coalition Proposal at 12.

⁶³⁶ The Coalition asserts that a 6 megahertz separation is required between MBS operations and two-way services operating in close proximity to an MBS receive site in order to protect reception of MBS video signals from beat interference. **See** Coalition Proposal at 14, n.35. It also argues that operations in these two bands be secondary to operations in the LBS, MBS and UBS bands unless otherwise agreed upon. **See** Coalition Proposal at 22. We note that the **3G Final Report** noted only that a guardband of at least two megahertz was needed to protect incumbent high-powered systems from adjacent channel interference. **See** 3G **Final Report** at 47-52.

⁶³⁷ Coalition Proposal at 17-18,

4. The Coalition recommends a market-by-market transition process to the new band plan that allows MDS and ITFS licensees to continue to operate pursuant to the current rules until an MDS or ITFS licensee triggers the transition process. They say that each of the market-by-market transition processes they propose will have four fundamental phases: (i) identifying the MDS and ITFS licensees that will have to participate in a given transition; (ii) planning the transition; (iii) physically shifting educational ITFS programming tracks to spectrum in the MBS and outfitting eligible ITFS receive sites with improved downconverters designed to limit the reception of signals from outside the high-power band; and (iv) terminating existing operations in transitioned markets that do not comport with the new rules.

Identifying the Parties to the Transition Process

5. As part of the basis it proposes for determining which licensees will participate in its proposed market-by-market transition process, the Coalition introduces a concept that they refer to as a “transition impact area” (“TIA”).⁶³⁸ They recommend that the TIA for a station be defined as its geographic service area plus, in the case of **ITFS** licensees, the specific location of any ITFS reception site certified as eligible to receive a new downconverter under the transition rules. However, they urge that there be one exception to the general approach for establishing the boundaries of GSAs and TIAs. They say that the GSAs of BTA authorization holders may be extremely large and a BTA authorization holder may not intend to launch services throughout its entire BTA/GSA at once. As a result, they explain, the size of the GSA/TIA of a BTA authorization holder calculated under the general rule may extend far beyond the area in which the BTA authorization holder’s intended operations will actually have any impact. To address that kind of situation, the Coalition makes the following suggestions:

- If the BTA authorization holder is the Proponent, it should be permitted to reduce voluntarily the size of its GSA/TIA solely for purposes of any given transition process. For administrative convenience, and to reflect the fact that deployments are likely to occur based on the GSAs of incumbent MDS and ITFS licensees, the reduced GSA/TIA should be required to mirror the boundaries of any GSA of any incumbent **MDS** or **ITFS** licensee that is wholly within the BTA and should be established by having the BTA authorization holder certify to the Commission that it will not provide service outside of that particular GSA. Upon such certification, the Coalition would have the GSA/TIA deemed to be reduced in size for purposes of the particular transition; neighboring licensees with GSA/TIAs that do not overlap the resulting smaller TIA could be excused from the transition process. In the event a BTA authorization holder provides such a certification but subsequently decides to expand its service area, the Coalition would have **us** require the BTA authorization holder to invoke the transition process anew as to any licensees that were excused from the process as a result of the initial reduction in the GSA/TIA.⁶³⁹

- The Coalition says that a BTA authorization holder that is not the Proponent should only be a required participant and should only be considered for purposes of determining the other licensees that must participate in a transition process when the BTA authorization holder holds a license or conditional license for one or more facilities within the BTA. If it does not, then the BTA authorization holder should not be a participant in the transition process and its GSA/TIA should be ignored for

⁶³⁸ *Id.* Appendix B at 12-13n.34

⁶³⁹ *Id.*

purposes of determining which other licensees are required parties to the process.⁶⁴⁰

- If a BTA authorization holder that is not the Proponent does hold a license or conditional license for one or more facilities within the BTA, says the Coalition, our rules should deem it to have separate **TIAs** defined as 35-mile-radius circles centered at each of its transmitting stations and/or response station hubs.”

6. As the Coalition envisions the process, a Proponent would institute a transition for a particular market in which the following nearby licensees (even those that are not cochannel or first adjacent channel) would be required participants:

- Every licensee that has not previously been transitioned and that has a TIA that overlaps the GSA in which the contemplated base station will be located; and
- every non-transitioned licensee with a TIA to which any of the contemplated facility's transmission antennas will have an unobstructed transmission path calculated assuming receive antenna heights of 9.1 meters above ground level and employing a smooth earth with **4/3** earth curvature propagation model; and
- every non-transitioned licensee with a **GSA** that overlaps the GSA of a license being transitioned pursuant to the first two conditions listed above.

Moreover, says the Coalition, no operations of a new or modified base station should be permitted in the low-power channels (even if the underlying license has transitioned) unless the same three categories of nearby licensees are transitioned by the licensee to the new band plan.”

7. In addition to the above-listed mandatory parties to the transition process, the Coalition argues that a Proponent should be permitted, at its sole discretion and at any time, to trigger the transition process with respect to any **MDS** or **ITFS** licensee that has a GSA located in whole or part within 150 miles of any portion of its GSA. Beyond that, they recommend that any transition should also include any license with a GSA overlapping a GSA being transitioned. Granting this right to Proponents, they contend, would serve a variety of needs, the most important of which is the need to address the possibility that if left in place outside the high-power band, high-power, high-site operations would interfere with the ability of cochannel cell sites that are placed above the ground clutter to receive low-power signals from consumer equipment.⁶⁴³

8. The Coalition urges that any licensee identified for transition under these policies should be required to participate in the transition process. However, they emphasize that we should not adopt a requirement that those who participate in the transition process must necessarily be transitioned to the new bandplan upon completion. First of all, they argue that any multichannel video programming distributor that was using more than seven MDS/ITFS channels for the transmission of digitally compressed video programming to subscribers, and any other MDS or ITFS station that is collocated

⁶⁴⁰ *Id.*

⁶⁴¹ *Id.*

⁶⁴² *Id.*, Appendix B at 12-13

⁶⁴³ *Id.*, Appendix B at 13.

with it, should be allowed to opt out of the transition process.⁶⁴⁴ For other stations, the Coalition says that many of the recoverable costs involved will be unknown to the Proponent at the time it issues a transition notice and that one of the purposes of the transition planning period should be to provide the Proponent an opportunity to identify **all** of the recoverable costs it will be responsible for should the transition occur. The Coalition says we should allow the Proponent at any time during the transition planning period to decide not to proceed with the transition due to transition cost considerations, and that the Proponent should be allowed to make that decision in its sole discretion. They further argue that the Proponent should be allowed to terminate the process in whole or in part with respect to any licensee that it voluntarily brought into the process and any other licensee that is required to be a participant solely because of a **GSA** overlap with the licensee voluntarily brought in by the **Proponent**.⁶⁴⁵

9. The Coalition notes that a Proponent will not be able to determine the TIAs of ITFS stations based on Commission records because the Commission does not maintain ITFS reception site records of the sort necessary to determine eligibility for replacement downconverters. They say that a Proponent will only be able to determine fully the TIA of an ITFS licensee by securing the necessary information from individual ITFS licensees. Therefore, they say, prior to the commencement of any transition process any potential Proponent should be permitted to serve upon any ITFS licensee at its address of record in the Commission's licensing database a pre-transition data request to elicit this information. They say we should require that such requests include the Proponent's full name, postal mailing address, contact person, email address, phone and fax number, and that the recipient of the request provide the potential Proponent with a listing that identifies the location (by street address and, if known, geographic coordinates) of every constructed **ITFS** reception site that, as of the date of receipt of the request, would be entitled to a replacement downconverter upon transition. In addition, they say, the listing should indicate whether the downconverter is mounted on a structure attached to the building or on a free-standing structure, and the approximate height above ground level of the downconverter. They say that, if known, the response should also specify the adjacent channel D/U ratio that can be tolerated by any receiver(s) at the reception site. Finally, they say we should require that the response identify the number of ITFS video programming or data transmission tracks the ITFS licensee is entitled to receive in the high-power band and whether the **ITFS** licensee will accept fewer tracks in the high-power band. They say that the response should be considered a representation not only to the potential Proponent, but also to the Commission, and should be sent by certified mail with return receipt requested, courier, overnight delivery, or other service that provides evidence of receipt. They say we should require that the recipient provide the requested information to the potential Proponent by any delivery service that provides evidence of receipt no later than 21 calendar days after delivery of the request.⁶⁴⁶

10. The Coalition goes on to recommend that, in the absence of a timely response, we should require the potential Proponent to make at least two attempts to contact both the licensee by telephone during normal business hours to ensure receipt of the request. They further recommend that, if the potential Proponent makes contact with the licensee and the licensee requests additional time to respond, we should allow the licensee an additional fifteen calendar days to respond. In the absence of a response, they say, the potential Proponent should be permitted to proceed with the transition without having to provide for the migration of any of the licensee's programming tracks to the high-power band, without

⁶⁴⁴ Coalition Supplemental Proposal, filed November 14, 2002, at 4-5; Coalition Proposal at Appendix B, 16-18.

⁶⁴⁵ *Id.*, Appendix B at 14.

⁶⁴⁶ *Id.*, Appendix B at 14-15.

replacing any of the licensee's downconverters, and with the un rebuttable presumption that the ITFS licensee's TIA is coterminous with its **GSA** unless the licensee subsequently provides the requested information to the Proponent before the end of the transition planning period and the Proponent is able to use that information as part of the transition process without prejudice to other parties and without significant additional expense to the Proponent.⁶⁴⁷

Planning **the** Transition

11. The Coalition advocates that we impose a basic procedural structure to the transition planning process. It proposes that no later than **30** days before conclusion of the transition planning period, we should require the Proponent to provide participants with a written plan for implementing the transition (the "Transition Plan"). They say we should require that the Transition Plan be sent by certified mail with return receipt requested, courier, overnight delivery, or other service that provides evidence of receipt. They maintain that the Transition Plan should identify the call signs of the stations that will transition to the new handplan, the specific channels that each will receive following the transition, the reception sites at which replacement downconverters will be installed, the video programming and data transmission tracks that will be migrated to the new high-power band, the technical configuration of the high-power facilities, and the approximate time line for effectuating the transition and ceasing operations pursuant to the current band plan. They say that the Transition Plan should also provide for the establishment of an escrow or other appropriate mechanism for ensuring completion of the transition in accordance with the Transition **Plan**.⁶⁴⁸

12. The Coalition says that each of the other participants should be permitted to submit a written counterproposal that would have to be received by the Proponent no later than ten business days before the conclusion of the Transition Planning Period. If the Proponent receives a counterproposal under the Coalition's plan the Proponent would have three options:

- First, the Proponent would be permitted to accept the counterproposal and proceed accordingly.
- Second, the Proponent would be permitted to invoke dispute resolution procedures for a determination as to whether its proposed Transition Plan is reasonable and take no action to implement the Transition Plan until a determination as to the reasonableness of the Transition Plan is made.
- Third, they say, the Proponent should be allowed to invoke the dispute resolution procedures **for** a determination as to whether its proposed Transition Plan is reasonable hut, instead of awaiting a ruling, implement the counterproposal immediately. To do so, the Proponent should be required to file copies of the Transition Plan and counterproposal with the Commission and advise the Commission that it is electing to proceed with the provisions of the counterproposal under protest. The Proponent would then be free to implement the counterproposal. If the counterproposal is implemented pending dispute resolution, and the Transition Plan ultimately is found to be unreasonable, the Proponent should be required to reimburse the party that submitted the counterproposal for the fees and expenses arising out of the dispute resolution process (including the fees and costs of the arbitrator(s), and reasonable legal and engineering fees and expenses). The Coalition says that, if the counterproposal is implemented pending dispute resolution, and the Transition Plan ultimately is found to be reasonable, the party that submitted the counterproposal should be required to reimburse the Proponent for those

⁶⁴⁷ *Id.*, Appendix B at 15.

⁶⁴⁸ *Id.*, Appendix B at 20.

additional documented costs incurred by the Proponent that were (i) over and above what the Proponent proposed in its Transition Plan, and (ii) directly related to implementing the counterproposal. This approach, they say, will assure that licensees do not create a dispute merely to frustrate a transition and/or force the payment of **greenmail**.⁶⁴⁹

Physically Shifting Educational ITFS Programming Tracks to **New**
Channels and Outfitting Eligible ITFS Reception Sites with
Improved Downconverters

13. The Coalition transition plan requires MDS licensees to pay their own expenses to transition to its proposed hand plan. However, to implement the objective of protecting those ITFS licensees that choose to continue traditional high-power, high-site downstream video and data distribution systems against interference from LBS and UBS cellularized operations, the Coalition recommends that the Proponent be required, at its cost, to satisfy two fundamental responsibilities: (1) installing at eligible ITFS receive sites improved downconverters designed to limit the reception of potentially-interfering signals from outside the MBS; and (2) physically shifting every ITFS video programming or data transmission tracks currently being transmitted to appropriate transmission facilities operating on MBS channels. The intent is that the Proponent will bear all equipment, installation and other direct costs incurred to provide for the continued reception of the **ITFS** video programming and data transmission tracks at the eligible receive sites.⁶⁵⁰

Terminating Existing Operations in Transitioned Markets That Do Not
Comport with the New Rules

14. Once the transition process is complete, licensees in the market will hold spectrum called for under the plan and be subject to the new rules.⁶⁵¹ The Coalition says that, in the process of transitioning the nation to the new bandplan, some licensees will be required to cease their current service offerings before they are in a position to launch new services under the new bandplan. They say that it may be necessary for licensees in one market to cease high-power, high-site operations in the LBS and UBS in order to avoid cochannel interference to next generation operations in markets quite some distance away. The Coalition says that the only build-out requirement under such circumstances should be that a licensee demonstrate substantial service at the expiration of its license. Thus, says the Coalition, licensees who have yet to construct facilities should not have their authorizations jeopardized by a failure to construct during this transitional period but should instead be judged under the “substantial service” standard that is applied to other services regulated by the Wireless Telecommunications Bureau. If the Commission chooses to apply Section 27.66 or some similar rule regarding the discontinuance, reduction or impairment of existing service, says the Coalition, the Commission should clarify the application of that rule to the MDS/ITFS transition process. Specifically, the Coalition proposes that the Commission issue a blanket waiver of that rule for all MDS and ITFS licensees, require the filing of a notice when service is commenced by a transitioned licensee operating under the new bandplan and thereafter apply the rule to that licensee in accordance with its terms. In this manner, they say, MDS and ITFS licensees will be able to smooth the transition process without fear that licenses will be jeopardized as stations cease operations to facilitate the transition. In addition, the Coalition says we should clarify that when a

⁶⁴⁹ Id., Appendix B at 20-21

⁶⁵⁰ Coalition Proposal Appendix B at 5-11. A number of MDS licenses contend that all MDS and ITFS licensees should be required to transition at their own expense. See MMDS Licensee Coalition comments at 3.

⁶⁵¹ See Coalition Proposal, Appendix B for a more detailed description of the transition process

licensed MDS or ITFS channel is used as a guard band rather than for transmissions, no filings will be required to safeguard the license for the channel being utilized as a guard band.⁶⁵²

Response Channels

15. As noted above, the seven 125 kHz response channels (part of the R channels under the Coalition band plan) associated with MDS channels E3, E4, F3, F4, H1, H2, and H3 were allocated to **the** Private Operational Fixed Service (POFS). The Coalition proposes to return these channels for MDS use.⁶⁵³ There are no POFS licensees currently on these channels. As the Coalition notes, the **R** channels taken from MDS licensees were never licensed as OFS channels, probably because they are too narrow to be usable by themselves. The Coalition contends that returning those channels to their original licensees, i.e., MDS operators, would enable them to accumulate the channels with other **R** channels, increasing the probability that the channels would be **used**.⁶⁵⁴ On that basis, they propose to reallocate the seven response channels – 2686.9375, 2687.9375, 2688.5625, 2688.6875, 2688.9375, 2689.5625 and 2689.6875 – for MDS (broadband) use.

16. The Coalition recommends that operation on the response **®** channels be secondary to operation **on** the LBS, MBS, and UBS channels. In other words, operation on the response channels would not be allowed to cause harmful interference to operations on the LBS, MBS, and UBS channels and would be required to accept any interference caused by an LBS, MBS, or UBS licensee operating in accordance with the Commission's Rules.⁶⁵⁵

Geographic Area Licensing

17. The Coalition argues that elimination of site-by-site licensing and adoption of a geographic area-licensing concept for low-power operations will promote deployment **of** advanced low-power systems because a site-by-site licensing system is cumbersome and the transaction costs are too high to permit competitive businesses to flourish using next generation **technology**.⁶⁵⁶ It notes that high-powered, one-way operations could benefit from a streamlined site-by-site licensing approach.”

18. MDS auction winners already hold geographic service area (“GSA”) authorizations. The Coalition proposes to give existing site-based MDS and **ITFS** licensees a geographic service area or GSA, based on the current **rules**.⁶⁵⁸ Applicants for new stations on **ITFS** channels must provide protection to incumbents based on a Protected Service Area (PSA).⁶⁵⁹ MDS incumbents that obtained their licenses

⁶⁵² Coalition Proposal, Appendix **B** at 4 n.9.

⁶⁵³ Coalition Proposal at 12, n.30

⁶⁵⁴ *Id.*

⁶⁵⁵ Coalition Proposal at **31**

⁶⁵⁶ **See** Coalition Proposal at 19.

⁶⁵⁷ *Id.*

⁶⁵⁸ Coalition Proposal at 20

⁶⁵⁹ 47 C.F.R. §§ 74.903, 21.902(d). An ITFS licensee's protected service area includes the area within a 35-mile radius of its transmitter site plus any reception sites beyond that radius that were registered with the Commission on September 17, 1998. Beginning on September 15, 1995, the initial service boundaries were (continued...)

prior to our 1996 MDS BTA auction have 35-mile PSAs around their main stations?”

19. The Coalition also proposes that we grandfather certain ITFS receive sites located outside the PSA.⁶⁶¹ Under the Coalition’s proposal, ITFS licensees must provide technical information to co-channel and adjacent channel licensees concerning the receive sites within twenty-one days of a request.⁶⁶²

20. In discussing the issue of a protected area for incumbents, the Coalition points out that the rules defining a protected area have changed over the years. As a result, the protected service areas assigned co-channel incumbent MDS and ITFS licensees can overlap.” The Coalition argues that since none of the licensees with service areas that overlap can satisfy the interference protection criteria in the overlap area, no one can operate in these areas.⁶⁶⁴ According to the Coalition, the MDS/ITFS industry has informally developed a method for handling this problem. The Coalition notes that the general method for dividing the overlap area is to draw a straight-line (chord) beginning and ending at the two points where the protected service areas intersect.⁶⁶⁵ This approach has the effect of drawing a boundary along the line connecting the ends of the football-shaped overlap area, with the licensees on either side agreeing to limit the interference they generate outside their boundaries. The Coalition proposes that we codify this approach.

Treatment of Incumbent Licensees

21. The Coalition would have the transition proceed on a market-by-market basis, triggered by Proponent offers to compensate incumbents for changing their operations from high-power to low-power. Rather than apply a deadline, the Coalition describes nine “safe harbors” – offers that incumbents would be required to accept if Proponents offer them.

22. The Coalition says that implementing market transitions should be a relatively simple process where all of the 2.5 GHz channels are collocated and operating with matched technical parameters and all of the ITFS licensees are using just one 6 MHz channel for the transmission of

(Continued from previous page) _____

frozen, i.e., the circular PSA boundaries were not to be changed regardless of whether or not the licensee subsequently moved its transmitter. *Id.*

⁶⁶⁰ See 47 C.F.R. §§ 21.902(d), 21.933(a).

⁶⁶¹ Coalition Proposal at 35.

⁶⁶² ITFS licensees must identify the location of such receive sites, the antenna make and model and the antenna height above ground and, if known, the adjacent channel D/U ratio that can be tolerated. See Coalition Proposal at 35-36.

⁶⁶³ Effective September 15, 1995, the Commission expanded the protected service areas of incumbent site-based MDS and ITFS licensees from fifteen miles to thirty-five miles. Amendment of Parts 21, 43, 74, 78, and 94 of the Commission’s Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, & Cable Television Relay Service, *Second Order on Reconsideration*, 10 FCC Rcd 7074 (1995). In doing so, it created a number of overlaps between licensees whose PSAs had not overlapped before the standard PSA radius was increased.

⁶⁶⁴ Coalition Proposal at 20-21 (e.g., the rule changes have created a “no man’s land”)

⁶⁶⁵ See Coalition Proposal Appendix A for a detailed explanation

educational programming but that there will be situations that deviate from that standard. To minimize disputes between Proponents and licensees in such cases, they say, the Commission should establish a series of safe harbors that will allow Proponents to craft Transition Plans with the knowledge that they will be deemed reasonable in the event of a dispute. They recommend that we adopt the following safe harbor definitions and deem them to be reasonable Transition Plan provisions that can be offered by a Proponent and implemented absent agreement from affected licensees.⁶⁶⁶

- **Safe Harbor # 1** As is discussed above, the default high-power channel assigned each channel group generally will be authorized to operate after the transition with the same transmission parameters (coordinates, antenna pattern, height of center of radiation, EIRP, etc.) as the current downstream facilities authorized for the channel group. However, the Coalition says that situations are likely to arise where minor changes to the operating parameters are necessary to accomplish the transition. They say that neighboring cochannel or adjacent channel licensees should not be permitted to object to any change from the default configuration **so** long as either: (1) the change is not a major modification under the new high-power rules; or (2) the change is a major modification and the Transition Plan calls for the appropriate application for Commission consent to be filed, for it to be processed in accordance with the procedures assuring public notice and an opportunity to object, and for it to be granted prior to implementation. They say that the **ITFS** licensee being migrated should not be permitted to object to a Transition Plan that proposes affording the **ITFS** licensee with post-transition operating equipment that is as good as or better than that used before the transition. Provided that the Proponent is not proposing a change in the geographic coordinates of the facilities (other than as necessary to conform the actual location with the Commission's Antenna Survey Branch database) and provided further that the minimum DIU benchmarks discussed above will be achieved, they say, the Proponent should be permitted in the Transition Plan to propose:
 - An increase in the height of the center of radiation of the transmission antenna or a decrease in such height of no more than 8 meters (provided that such change does not result in an increase in antenna support structure lease costs to the **ITFS** licensee and the consent **of** the owner of the antenna support structure is obtained).
 - A change in the EIRP of the transmission system **of** up to 1.5dB in any direction.
 - Digitization, which is discussed in more detail below in Safe Harbor # 3, precision frequency offset, or other upgrades to the **ITFS** transmission or reception systems that allow the Proponent to invoke more advantageous interference protection requirements applicable to upgraded systems."⁶⁶⁷
- **Safe Harbor # 2** The Coalition says that, in some cases, prior to the transition, an **ITFS** licensee may have channel-shifted its single video programming or data transmission track to spectrum licensed to another licensee. Under the transition rules, they note, that track must be on the high-power channel licensed to the **ITFS** licensee upon completion of the transition. For example, the **A** Group licensee might have shifted its **ITFS** video programming to channel C1. If one of the **A** Group channels is currently licensed with technical parameters substantially similar to those of channel C1, we should allow a Transition Plan to call for high-power channel A4 to be licensed

⁶⁶⁶ *Id.*, Appendix B at 21.

⁶⁶⁷ *Id.*, Appendix B at 21-22.

with the same technical parameters as current channel C1. However, if the current A Group channels are licensed to operate with technical parameters materially different from those of channel C1, the Proponent should have two options. First, it should be allowed to arrange a channel swap with the licensee of the C Group so that the A Group licensee will receive high-power channel C4 (which will automatically be licensed with the same transmission parameters as current channel C1) in exchange for channel A4. Second, the Proponent should be allowed to arrange for high-power channel A4 to operate with transmission parameters substantially similar to those of current channel C1 (see Safe Harbor# 1).⁶⁶⁸

- **Safe Harbor # 3** The Coalition says that, where an ITFS licensee would be entitled to two or more video programming or data transmission tracks in the high-power band, absent agreement prior to or during the Transition Planning Period to the contrary, we should allow the Proponent two options:
 - First, we should allow the Transition Plan to call for migration of one of those programming tracks to the ITFS licensee's default channel in the high-power band segment (e.g., channel A4 in the case of the A Group licensee) and provide the ITFS licensee an additional 6 MHz channel in the high-power band for each additional ITFS video programming or data transmission track. If the Proponent chooses this option, we should require it to assure that the additional high-power channels will be able to operate with transmission parameters substantially similar to those of the channel(s) on which the ITFS video or data tracks were broadcast before the transition (see Safe Harbor # 2). In exchange, the contributor of each additional high-power channel would be entitled to one of the recipient ITFS licensee's channels in one of the low-power bands for each additional high-power channel provided. They say we should allow the additional high-power channels for this purpose to be ones that would have been licensed to the Proponent under the default system, or be made available by way of channel swapping arrangements with other licensees in the market orchestrated by the Proponent. The Coalition says that the channels the contributor receives in exchange for its high-power channel should be located at one of the ends of the recipient ITFS licensee's default allocation, rather than in the middle.
 - In the alternative, they say, we should allow the Proponent to exercise the power of calling for the installation of digital compression technology to transmit multiple tracks on the licensee's default high-power channel(s). In any case where the licensee's existing tracks are provided on only one channel using digital compression, however, the Proponent should be required to install digital compression technology on a single channel.⁶⁶⁹
- **Safe Harbor # 4** In some cases, multiple licensees currently share a channel group, with each licensed individually to one or more channels. The Coalition says that, if the licensees are either MDS licensees or ITFS licensees who do not choose to migrate programming to the high-power band and those licensees are unable to reach agreement with each other on the post-transition licensing of channels, we should allow the Proponent's Transition Plan to provide for the licensing of the spectrum in each segment on a pro rata basis (with channel(s) in each segment

⁶⁶⁸ *Id.*, Appendix B at 22-23.

⁶⁶⁹ *Id.*, Appendix B at 23-24.

being disaggregated when and if necessary to provide each licensee with its pro rata share of the spectrum in each segment). If the multiple licensees are ITFS licensees and each is entitled to video programming or data transmission tracks, as in Safe Harbor # 3, they say, the Proponent should have two choices absent agreement otherwise:

- First, the Proponent should be allowed to secure for each licensee its own 6 MHz high-power channel in exchange for low-power channels assigned to the group. Following the channel swap(s) necessary to secure those additional high-power channels, we should allow the Transition Plan to provide for the licensing of the remaining channels in the low-power band segments and response channels on a pro rata basis (with channel(s) in each segment being disaggregated when and if necessary to provide each with its pro rata share of the spectrum in each segment).
- Second, the Coalition argues, we should allow the Transition Plan to call for pro rata segmentation of the default high-power channel for the group, provided that the Proponent commits to provide each of the licensees with the technology necessary for its ITFS video programming or data transmissions to be digitized, transmitted and received utilizing the provided bandwidth. Under this approach, the low-power channels would be divided among the sharing licensees on a pro rata basis (with channel(s) in each segment being disaggregated when and if necessary to provide each with its pro rata share of the spectrum in each segment). If only one of the sharing ITFS licensees elects to migrate video programming or data transmissions to the high-power band, we should provide that the default high-power channel assigned to that channel group be licensed to that licensee. The remaining spectrum assigned to the group should be allocated among the licensees on a pro rata basis, with the 6 MHz in the high-power band counting against that licensee's portion. To the extent necessary, they say, we should provide that the low-power spectrum could be disaggregated when and if necessary to provide each licensee with its pro rata share of the spectrum in each segment. If the one licensee that elects to migrate ITFS video programming transmits multiple ITFS video programming tracks, they say, the options identified in Safe Harbor # 3 should be available to the Proponent to satisfy its migration obligations. We should further provide that, if the proponent chooses to effectuate a channel swap to provide more than one channel in the high-power band, they add, the remaining channels assigned to the group (after considering that one or more low-power channels and associated Transition Band channels will have been swapped away to provide the additional high-power channel) could be allocated among the licensees on a pro rata basis (with channel(s) in each segment being disaggregated when and if necessary to provide each with its pro rata share of the spectrum in each
- **Safe Harbor # 5** Cases may arise in which, prior to the transition, the ITFS licensee of a single four channel group was operating some channels from one location and the other channels in the group from a second (or a third, or a fourth location). The Coalition says that, if the simultaneous ITFS video or data tracks are being transmitted from only one location, we should provide that the technical parameters of that location will govern the high-power license. If ITFS tracks are being transmitted from multiple locations, they say, we should require that the Proponent provide for the post-transition transmission of the appropriate number of ITFS tracks at each such location. They say we should consider the Transition Plan to be considered reasonable if it calls

⁶⁷⁰ *Id.*, Appendix B at 24-25

either for the licensing of a separate high-power channel at each location (in which case spectrum in the low-power band would be swapped) or if it calls for the split-licensing of the default high-power channel at multiple locations.⁶⁷¹

- **Safe Harbor # 6** The Coalition says that, although Transition Plans should generally be designed to minimize the amount of time ITFS transmissions will have to cease, some disruption is inevitable. For that reason, they say that a Transition Plan should not be considered unreasonable if it calls for interruptions in ITFS transmissions, so long as those interruptions are limited to a period of seven or less consecutive days at any reception site. However, they add, we should require the Proponent to coordinate with each ITFS licensee to minimize the extent of any disruption. We should allow the Transition Plan to call for the shifting of an ITFS licensee's program to alternative channels, and such shifting should not be considered an interruption *so* long as the ITFS licensee's receive sites are equipped to receive and internally distribute the channel to which the programming is shifted.
- **Safe Harbor # 7** The Coalition says that a Proponent may determine that interference from transmissions in the high-power band to operations outside the high-power band can be mitigated by the installation of an appropriate filter on the high-power transmitter. In such case, they say, we should require the licensee operating the high-power transmitter to accept any filter proffered by the Proponent as part of a Transition Plan or thereafter and to cooperate reasonably with installation of that filter, as long as the Proponent can demonstrate that the installation of such a filter would not unreasonably degrade the performance of the licensee's system. If installation of the proposed filter would not cause a delta group delay of more than 100 nanoseconds for analog operation or more than 20 nanoseconds for digital operation, says the Coalition, we should not deem the installation of the filter to be unreasonably degrading the performance of the system. They argue that we should require the Proponent to supply technical information regarding the proposed filter to the high-power licensee to allow the high-power licensee to make that determination.⁶⁷²
- **Safe Harbor # 8** The Coalition notes that, in some cases, the facilities being transitioned will be used by a commercial multichannel video programming distributor ("MVPD") that either is not eligible for the opt-out program proposed by the Coalition or has chosen not to avail itself of the opportunity. In such a situation, they say, we should deem a Transition Plan to be reasonable if it provides the greater of two years from the date of the filing date of the Coalition Plan (October 7, 2002) or six months from the Proponent's transition notice before the MVPD and its affiliated licensees are required to comply with the technical rules applicable to the low-power band segments. The Coalition say they recognize that compliance with such a rule may require modification to the MVPD system, which will have to be undertaken at the MVPD's cost except as they relate to the transition of ITFS programming to the new high-power band. They say that the time afforded by this safe harbor should provide an ample opportunity for the MVPD and its affiliated licensees to make the appropriate adjustments.⁶⁷³
- **Safe Harbor # 9** The Coalition notes that there will be situations in which an ITFS licensee uses one or more of its channels for studio-to-transmitter links. In such a case, they say, we should

⁶⁷¹ *Id.*, Appendix B at 25-26.

⁶⁷² *Id.*, Appendix B at 26.

⁶⁷³ *Id.*

consider the Transition Plan to be reasonable if it provides for either **of** the following:

- the use of one of the low-power band segments for the point-to-point transmission of the ITFS video or data (through superchannelization of the licensee's contiguous low-power channels), provided the Proponent commits to re-tune the existing point-to-point equipment to operate on those channels or to replace the existing equipment with **new** equipment tuned to operate on those channels and the proposal complies with the low-power technical and interference protection rules;
- the migration of the ITFS programming to the high-power band by re-tuning the existing point-to-point equipment to operate in the high-power band or replacing it with equipment tuned to operate in the high-power band;
- the replacement of the point-to-point link with point-to-point equipment licensed to the ITFS licensee in alternative spectrum, so long as the replacement facilities meet the definition of "comparable facilities" set out in Section 101.75(b) of the Commission's rules.⁶⁷⁴

⁶⁷⁴ *Id.*, Appendix B at 26-27

APPENDIX D

LIST OF PLEADINGS

The following documents were filed in response to the **Public** Notice: Wireless Telecommunications Bureau Seeks Comment on Proposal to Revise Multichannel Multipoint Distribution Service and the Instructional Television Fixed Service Rules, RM-10586, 17 FCC Rcd 20526 (WTB 2002).

LIST OF PARTIES RESPONDING TO THE PUBLIC NOTICEComments

Adams Telecom, Inc.
Archdiocese of Chicago
Archdiocese of Detroit
Archdiocese of Hartford
Archdiocese of Los Angeles Education and Welfare Corporation
Atlanta Educational Services, Inc. and Atlanta Board of Education
BellSouth Corporation et al.
Board of Trustees of the Leland Standard Junior University
Bums, Patrick J.
Caritas Telecommunications
Catholic Telemedia Network
Central Texas Communications Inc.
Clarendon Foundation
Clearwire Equipment, LLC
Clearwire Technologies, Inc.
CNI Wireless, Inc.
Comspec Corporation
Counterpoint Communications, Inc.
Crowell & Moring
Dallas MDS Partners
Department of education Archdiocese of New York
Diocese of Dallas
Diocese of Orange
F Corporation
Illinois Institute of Technology
Independent & Wireless Video Operators
IF Wireless, Inc.
IT&E Overseas, Inc.
ITFS Parties
ITFS Spectrum Development Alliance
Kessler and Gehman Associates
Leano Rural Telephone Cooperative Inc.
Maui Sky Fiber, LLC
Michael Kelly Revocable Trust, d/a/a Shannondale Wireless
MMDS License Coalition
National Telecommunications Cooperative Association
Navini Networks, Inc.

Network for Instructional TV, Inc.
Nokia Inc.
Nucentrix Broadband Networks Inc.
Qualcomm Incorporated
Rioplex Wireless, Ltd
Roman Catholic Diocese of Rockville Centre
Sprint Corporation
The Alliance of Independent Wireless Video Operators
Texas State Technical College, Harlingen
University of Colorado
W.A.T.C.H. TV Company
Wireless Communications Association (WCA), National Instructional Television Fixed Service (NIA)
and Catholic Television Network (CTN)
WH-TV, Inc. d/b/a Digital TV One
Winbeam, Inc.
Worldcom. Broadband Solutions, Inc.

Reply Comments

Intel Corporation
ITFS Spectrum Development Alliance, Inc.
Microsoft Corporation
Network for Instructional TV, Inc.
Nucentrix Broadband Networks, Inc.
NTELOS, Inc.
Polar Communications Mutual Aid Corporation
Sprint Corporation

**SEPARATE STATEMENT OF
CHAIRMAN MICHAEL K. POWELL**

Re: Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands (RM-10586); et al.

By today's Notice, the Commission explores ways for the American people to enjoy the full potential of a large parcel of previously underutilized, prime spectrum real estate. The opportunity is monumental – the MMDS/ITFS band ("2.5 GHz Band") encompasses 190 MHz of contiguous spectrum. This is more than double the 83 MHz that spurred the development of WiFi at 2.4 GHz. It is roughly equal to all spectrum currently devoted to terrestrial, mobile wireless – a ubiquitous, nationwide service characterized by a high-level of competition, low prices, and constant innovation. But the 2.5 GHz band has not yet delivered similar rewards, in no small part because of the well-intentioned, but ultimately misguided, regulatory decisions of this agency.

The 2.5 GHz band has labored for years under the heavy hand of command-and-control regulation. The regime has not served the American people or the Commission's licensees particularly well. Our rules have, at times, been complex and stifling, and have shifted in their objectives – from promoting competition in the MVPD market to offering rural broadband solutions. Despite the uncertainty caused by these regulatory shifts, many licensees have strived to provide innovative and quality services. In particular, some ITFS licensees have conscientiously provided valuable educational opportunities and services to the communities they serve. Similarly, some MMDS licensees have invested considerable resources in researching, developing and deploying networks to provide service in these bands. This Notice is not intended to undermine those efforts. Instead we seek to expand the rights and opportunities of 2.5 GHz licensees, affording them greater flexibility to deliver services to the American people.

As we re-think our spectrum policies in light of the recommendations of the Spectrum Policy Task Force, the time has come chip off the regulatory barnacles encumbering ITFS and MMDS. By this Notice, we explore opportunities to increase licensed use of the 2.5 GHz band via spectrum auctions, examine unlicensed spectrum options, and evaluate rule changes to effectuate our earlier decision to add a mobile allocation to the band. I applaud the work of the National ITFS Association, the Wireless Communications Association International and the Catholic Television Network to develop proposals for the evolution of this band and to expand opportunities for all licensees to achieve their missions. I look forward to continuing our work with them to eliminate the regulatory barriers that have hindered the development of this band for far too many years.

**SEPARATE STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY**

Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66; Part 1 of the Commission's Rules – Further Competitive Bidding Procedures. WT Docket No. 03-67; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions, MM Docket No. 97-127; Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Licensing in the Multipoint Distribution Service and the Instructional Television Fixed Service for the Gulf of Mexico. WT Docket No. 02-68, Notice of Proposed Rulemaking and Memorandum Opinion and Order

This NPRM recognizes that many MMDS and ITFS licensees currently provide very valuable services to the public. For example, many schools rely on ITFS-based services in order to complete their missions to provide educational services to their communities through distance-based learning.

It also appears, however, that these services have not yet reached their full potential and some of the spectrum remains underutilized. Many licensees have repeatedly told us of the many regulatory hurdles they face when attempting to deploy the new, innovative services demanded by the market. Today's NPRM is a step-forward to resolving many of these issues by seeking ways to promote greater flexibility for licensees. I don't know if this spectrum is best used to offer a third broadband pipe to the home, a mobile solution, a broadcast alternative or some other market-driven product, but I am willing to ask the question.

Underutilized and unused spectrum has little value. I believe that the public interest is best served by creating regulatory policies that foster effective investment and stimulate the delivery of service to the public. Today's NPRM is a substantial move toward achieving that goal by gathering a record on which the Commission can craft an appropriate band plan and service rules to ensure that the spectrum available for use by the MMDS/ITFS community can be used as efficiently and effectively as possible by licensees.

Moreover, I continue to support the contributions of the ITFS licensees and the important role these licensees play in furthering educational opportunities for all of us. Today's NPRM does not inhibit the ability of ITFS incumbents to offer their services as long as they wish. It simply provides a forum for looking at ways to improve the flexibility afforded to all users of the MMDS/ITFS spectrum. I believe that affording flexibility to license holders is imperative if we are to achieve the goal of efficient and effective use of the Udiocommunications spectrum resource.

I recognize, however, that certain ITFS and MMDS licensees did not obtain their authorizations at auction and depending on the outcome of this proceeding they may obtain an increased value through secondary markets. Accordingly, I believe as we review the record in this proceeding, we must carefully weigh the public interest benefits of the auction proposal in comparison to having spectrum underutilized.

Finally, I would like to add my thanks to the Coalition – the group that submitted the initial plan that formed the basis of the **NPRM**, the other innovators in the band, and the hard work of the Wireless Telecommunications Bureau in moving forward with this proposal.

**SEPARATE STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

RE: *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Fixed and Other Advanced Services in the 2150, 2162 and 2500-590 MHz Bands; Part 1 of the Commission's Rules - Further Competitive Bidding; Part 1 Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; and Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico (Notice of Proposed Rulemaking, Memorandum Opinion and Order)*

It is the Commission's responsibility to promote the efficient and efficient use of the 2.5 GHz band, and I commend the Chairman and the Wireless Bureau for their action on this NPRM. The wide-ranging item included in this item will allow the Commission to explore several different ways of making ITFS, MML and MDS serve America's students and consumers better.

However, I do express some concern about the potential results of this proposal. The NPRM asks whether the Commission should remove the requirement that ITFS licensees use the spectrum entrusted to them for educational purposes. It also asks whether the Commission should allow ITFS licensees to sell their licenses to the highest bidder where a private company could buy the spectrum and discontinue any educational activity. Such an action would threaten the integrity of the educational tool. If ITFS becomes just another commercial service, we will have lost the last place on the spectrum reserved specifically for ITFS. ITFS has its problems. It worries me greatly that many licensees lease such a high percentage of their spectrum to companies that do not engage in education, and that some licensees have not built out their facilities even though they have licenses for many years. But I would rather work to make ITFS a better educational tool than say that it cannot be saved.

As we all know, the Commission has sided with ITFS almost forty years ago. It did so to give educators a powerful tool to help their students. The paramount public interest in the ITFS spectrum should continue to be to support an educational service. While we must seek to find a way that will result in the ITFS spectrum being used more effectively, and we must admit that the current use of ITFS is not as ideal as it should be, our goal must be to do this in a way that promotes the public interest.

Initially, all ITFS licensees were given their spectrum for free. This makes sense as they are public schools and non-profit educators and were required to use their spectrum to serve the public. The same rule applied to MML and MDS licensees also given their spectrum for free. If we allow these licensees to sell their spectrum, we could see a rush of licensees who are not in the public interest for free selling their licenses and pocket the proceeds. If this occurs we will be vulnerable to charges of unjust windfall profits using the public spectrum. While these licensees are educational institutions or public interest entities, I do not see how this serves the public interest. Wisely, this NPRM queries whether such an outcome is desirable.

But in the end this is a NPRM and not an order. The Bureau and my colleagues worked hard to ensure that the item includes wide-ranging questions that allow us to choose several paths. It does not include any of the alternatives I just described. This means that I can support this NPRM. I appreciate the flexibility they showed in the drafting process.

Lastly, I want to recall that the record in last year's proceeding entitled *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems* makes it clear that many in the education community make excellent use of the band. The 1,275 current ITFS licensees serve millions of students on thousands of channels at more than 70,000 locations. The licensees form a broad spectrum of educators and educational entities, including state governments, state universities, public colleges, secondary schools, elementary schools, parochial and private schools, public television stations, and hospitals. These educators use the ITFS spectrum for a variety of innovative and successful applications, including telecourses at all educational levels, traditional educational programming, professional and worker training, and back office administrative communications for schools.

In order to illustrate the public interest value of this service I believe that it is important to highlight examples of the efforts of a few licensees in three broad areas where ITFS improves our country's educational performance.

- **Rural access.** The South Carolina Educational Television Commission includes more than 60 stations. It serves nearly 800 public schools and more than 400,000 students. Given that a majority of South Carolina's students live in rural areas, ITFS allows the state to tailor its educational technology plan so rural students have access to 1,500 hours of new educational programming each year, as well as live, interactive remote instruction. These powerful services might otherwise be beyond the reach of rural schools.
- **Inner city access.** The Catholic Television Network uses its ITFS licenses to serve more than half a million students and 4 million households. Recipients of these services include schools, colleges, parishes, community centers, hospitals, nursing homes, and residences across the country. From the Los Angeles Archdiocese to the New York Archdiocese, these ITFS licensees are providing critical educational services to a large number of low-income communities where services delivered via CTN's ITFS facilities bring educational resources that are otherwise unavailable.
- **Worker training.** Stanford University operates five ITFS channels. Using these channels, the university offers 250 graduate-level courses each year to thousands of workers at hundreds of companies in Northern California. In an era when "knowledge-based workers" are the most valuable resource to our national economy, the ITFS is giving Stanford and educational institutions around the country the ability to improve worker skills and improve productivity through remote education.

I look forward to the comments in this proceeding, and encourage as many ITFS licensees as possible, many of whom are not frequent commenters to the FCC, to get involved. We need your input